FILED

No. 95 1929 MAY 2 9 1996

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1995

MARY McCABE, as Administratrix of the Estate of Ruchla "Rose" Zinger,

*Petitioner,*

*vs.*

THE CITY OF LYNN,

*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit*

## PETITION FOR WRIT OF CERTIORARI

CHARLES M. CAMPO, JR.
*Counsel of Record*
FLOYD H. ANDERSON, JR.
STEVEN M. BLOOM
KASSLER & FEUER, P.C.
*Attorneys for Petitioner*
101 Arch Street
Boston, Massachusetts 02110-1103
(617) 439-3800

8919
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

90 pp

## QUESTION PRESENTED

Whether the First Circuit erred in creating a new and unprecedented exception to the longstanding and consistent requirement of the Fourth Amendment that, absent exigent circumstances, government agents must obtain a warrant to make a forcible entry into the home of a law-abiding citizen.

## LIST OF PARTIES TO THE PROCEEDING

The petitioner is Mary McCabe, as administratrix of the estate of Ruchla "Rose" Zinger. She was the plaintiff in the proceedings in the District Court for the District of Massachusetts and was the appellee before the United States Court of Appeals for the First Circuit.

The respondent is the City of Lynn, Massachusetts, a municipal corporation duly incorporated under the laws of the Commonwealth of Massachusetts. The respondent was a defendant in the district court proceedings below and was an appellant before the United States Court of Appeals for the First Circuit.

Life-Line Ambulance Service, Inc. was a defendant in the district court proceedings below and was also an appellant before the United States Court of Appeals for the First Circuit, but its appeal was dismissed pursuant to an agreement of voluntary dismissal.

There were a number of other defendants in the district court proceedings below all of whom were dismissed at various points prior to the appeal pursuant to stipulations of dismissal.

The only parties to this action are Mary McCabe, as administratrix of the estate of Ruchla "Rose" Zinger and the City of Lynn, Massachusetts.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| List of Parties to the Proceeding | ii |
| Table of Contents | iii |
| Table of Citations | iv |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Constitutional and Statutory Provisions Involved | 1 |
| Statement of the Case | 1 |
| A. Facts | 1 |
| B. Decisions Below | 4 |
| Reasons for Granting the Writ | 5 |
| I. This Case Raises An Issue Of Great Importance | 6 |
| II. The Decision Below Is An Unjustified Deviation From Consistent Precedent | 9 |
| III. The Decision Below Conflicts With The Decisions Of Other Courts. | 10 |

*Contents*

*Page*

IV. The Reasons For Granting Certiorari Are Equally Or More Compelling In This Case Than In *Soldal v. Cook County* ..... 12

Conclusion ..... 14

## TABLE OF CITATIONS

**Cases Cited:**

*Camara v. Municipal Court*, 387 U.S. 523 (1967) ..... 6, 10

*Glass v. Mayas*, 984 F.2d 55 (2d Cir. 1993) ..... 11

*Gooden v. Howard County, Md.*, 954 F.2d 960 (4th Cir. 1992) ..... 11

*Griffin v. Wisconsin*, 483 U.S. 868 (1987) ..... 5, 6, 10

*Harris v. Pirch*, 677 F.2d 681 (8th Cir. 1982) ..... 11

*In Re Barnard*, 455 F.2d 1370 (D.C. Cir. 1971) ..... 11

*Maag v. Wessler*, 960 F.2d 773 (9th Cir. 1991) ..... 11

*New Jersey v. T.L.O.*, 469 U.S. 325 (1985) ..... 9, 10, 11

*New York v. Burger*, 482 U.S. 691 (1987) ..... 6

*O'Connor v. Ortega*, 480 U.S. 709 (1987) ..... 6, 9, 10, 11

*Contents*

*Page*

*Payton v. New York*, 445 U.S. 573 (1980) ..... 5, 10, 13, 14

*Pino v. Higgs*, 75 F.3d 1461 (10th Cir. 1996) ..... 11

*Silverman v. United States*, 365 U.S. 505 (1961) ..... 5

*Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992) .... 5, 12, 13, 14

*Soldal v. County of Cook*, 942 F.2d 1073 (7th Cir. 1991) ..... 12, 13

*Specht v. Jensen*, 832 F.2d 1516 (10th Cir. 1987), *remanded on unrelated grounds*, 853 F.2d 805 (10th Cir. 1988) ..... 13

*United States v. United States District Court*, 407 U.S. 297 (1972) ..... 5

*Villinova v. Abrams*, 972 F.2d 792 (7th Cir. 1992) ..... 11

*Wyman v. James*, 400 U.S. 309 (1971) ..... 9, 10

**Statutes Cited:**

28 U.S.C. § 1254(1) ..... 1

42 U.S.C. § 1983 ..... 1, 4, 12

Mass. Gen. L. ch. 123, § 1 ..... 1

*Contents*

*Page*

Mass. Gen. L. ch. 123, § 12 ..... 1, 11

**United States Constitution Cited:**

Fourth Amendment .....i, 1, 4, 5, 7, 8, 12, 13

**Other Authorities Cited:**

Virginia A. Hiday, *Civil Commitment: A Review of Empirical Research*, 6 Behav. Sci. & L. 15 (1988) ..... 8

John Q. LaFond and Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 Vill. L. Rev. 71 (1994) ..... 8

Marilyn Rosenstein, *et al., U.S. Dept. of Health and Human Serv., Mental Health Statistical Note No. 178*, Legal Status of Admission to Three Inpatient Psychiatric Settings 1-4 (1986) ..... 8

**APPENDIX**

Appendix A — Judgment and Memorandum of the United States Court of Appeals for the First Circuit Dated February 29, 1996 ..... 1a

Appendix B — Corrected Memorandum and Decision of the United States District Court for the District of Massachusetts Dated February 2, 1995 ..... 36a

*Contents*

*Page*

Appendix C — Relevant Constitutional Provision and Statutes Involved ..... 58a

Appendix D — Application for Temporary Hospitalization ..... 64a

Appendix E — State Civil Commitment Statutes Authorizing Seizure Pursuant to Certification by Mental Health Professionals ..... 67a

## OPINIONS BELOW

The decision of the Court of Appeals is reported at 77 F.3d 540 (1st Cir. 1996) and is reprinted in the Appendix at 1a-35a. The decision of the District Court is reported at 875 F. Supp. 53 (D. Mass. 1995) and is reprinted in the Appendix at 36a-57a.

## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. § 1983 (1994) is reprinted in full in the Appendix at 58a.

Mass. Gen. L. ch. 123, §§ 1 and 12 (1988) (in effect on September 6th-7th, 1989) are reprinted in full in the Appendix at 59a-63a.

## STATEMENT OF THE CASE

### A. Facts

On September 6, 1989, a licensed psychiatrist signed an application (known in Massachusetts as a "pink paper") pursuant to Mass. Gen. L. ch. 123 § 12(a), for a 10-day involuntary

commitment of Ruchla "Rose" Zinger, a 64-year-old resident of Lynn, Massachusetts. The pink paper issued was based exclusively on third-party information.

Mrs. Zinger spoke and understood limited English; she suffered from high blood pressure and weighed 350 pounds. In addition to her physical maladies, Mrs. Zinger was a Holocaust survivor and suffered from psychological problems that were, in part, the product of her experiences during World War II.

The next morning, the pink paper was delivered to the Lynn Police Department, and Captain Joseph Csuka instructed Sergeant Richard Donnelly and Officers Gary Twyman and William Alphen (all of the Lynn Police Department) to serve the civil commitment order. Captain Csuka, although in possession of the pink paper throughout the morning, informed Sergeant Donnelly that the commitment would be carried out at 1:00 p.m. Captain Csuka advised Sergeant Donnelly that Mrs. Zinger would not cooperate with them and they would have to force their way into her house.

In addition to the involuntary commitment, an action had been brought against Mrs. Zinger resulting in an eviction order. Captain Csuka ordered the civil commitment to be carried out at 1:00 p.m. to accommodate a State Constable who would secure the premises following the eviction.

At the scene, the constable informed the officers that based on his prior attempts to serve eviction notices, he believed Mrs. Zinger would not answer the door. He directed them to go to the rear door for the easiest point of entry into the home. The officers knocked on the door and rang the doorbell. Mrs. Zinger did not answer. After approximately one minute, Sergeant Donnelly ordered Officer Alphen to kick down the door.

Once through the door, all three officers and the constable proceeded up the stairs to a second door, which was also locked. Officer Alphen knocked on the door and said "Hello, Police." When no one answered, Sergeant Donnelly ordered Officer Alphen to kick this door down. After Officer Alphen kicked through one panel, Mrs. Zinger came to the door and opened it slightly. Sergeant Donnelly showed Mrs. Zinger the commitment order and told her that she needed to see a doctor. Mrs. Zinger yelled "why, why, no doctors" and started to close the door. Sergeant Donnelly forced his foot between the door jam and the door preventing it from closing all the way. At this point, the officers pushed their way into Mrs. Zinger's home and forced her to the floor, face down.

With Mrs. Zinger forced into a prone position, all three officers handcuffed the 64-year-old woman behind her back while she struggled and screamed. During the process, Mrs. Zinger was so distraught she urinated on herself and on one of the officers who was sitting on her to hold her down.

Shortly after arriving at the scene, the officers called Life-Line Ambulance to transport Mrs. Zinger to a mental health facility because they believed she was too big to transport in the cruiser. When the ambulance crew arrived, they informed the officers that due to Mrs. Zinger's weight, they could not carry her down the stairs on a stretcher. Upon hearing this, the officers dragged Mrs. Zinger down the stairs on her buttocks.

After bringing Mrs. Zinger to the bottom of the stairs, the officers forced her face down on a stretcher, where she was strapped in, still handcuffed behind her back. At this time, she stopped moving, and one of the officers noticed that she was blue and that blood was coming down the side of her mouth. Rose Zinger was pronounced dead at 2:00 p.m.

**B. Decisions Below**

The administratrix of Mrs. Zinger's estate, Mary McCabe, brought suit against the City of Lynn, among others, under 42 U.S.C. § 1983, alleging that the City's policy permitting police officers to execute pink papers by means of forcible, warrantless entries into private residences, absent exigent circumstances, violated Mrs. Zinger's Fourth Amendment right to be free from unreasonable searches and seizures.

The district court granted the administratrix's cross-motion for summary judgment against the City on the issue of liability, 875 F. Supp. 53, 63 (D. Mass. 1995). The district court found that the City's policy, which did not require police officers to obtain a warrant before effecting an entry of a private residence to execute a pink paper, violated the Fourth Amendment. *Id.* at 58. Noting the significant delay between the time the pink paper was signed on September 6, 1989 and the time it was executed on the afternoon of September 7, 1989, the district court specifically found on undisputed evidence that no exigent circumstances were present in this case. *Id.* at 58-59. At trial, a jury awarded Mrs. Zinger's estate $850,000.00 in damages against the City and $500,000.00 against Life-Line Ambulance.

The City appealed, and the Court of Appeals for the First Circuit reversed, 77 F.3d 540 (1st Cir. 1996). The circuit court ruled that the City's policy of warrantless home entries for the purpose of serving involuntary hospitalization orders in civil commitment proceedings fell within a recognized class of systemic "special need" searches that may be conducted without warrants if they further important administrative purposes. *Id.* at 546. Balancing the nature and quality of the intrusion on an individual's Fourth Amendment interests against the importance of the governmental interests at issues, the Court of Appeals concluded that the City's policy of permitting, forcible

warrantless entries by police officers in possession of civil commitment orders was reasonable under the Fourth Amendment. *Id.* at 547.

This petition followed.

## REASONS FOR GRANTING THE WRIT

This case concerns an issue that goes to the very heart of the protection secured by the Fourth Amendment. As this Court recognized in *United States v. United States District Court*, 407 U.S. 297, 313 (1972), "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Indeed, this Court has "emphasized that 'at the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

Accordingly, this Court has recognized that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590 (1980). This Court should grant Certiorari because the decision below crosses that "firm line."

Prior to the decision below, the law was clear that, absent exigent circumstances, government agents are required to obtain a warrant before making a forcible entry into the home of a law-abiding citizen. In manufacturing a new exception to this longstanding requirement, the First Circuit relied on two inapplicable strands of doctrine — one that allows warrantless entries into the homes of *probationers*, *see Griffin v. Wisconsin*, 483 U.S. 868 (1987); and another that permits warrantless

searches of some areas, *but not homes*, in certain administrative contexts, *see e.g.*, *New York v. Burger*, 482 U.S. 691 (1987) (warrantless search of automobile junkyard); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (warrantless search of public employee's desk).

Reliance on either of these strands of doctrine is wholly inappropriate. The rights of probationers (or parolees) are not coextensive with those of law-abiding citizens. Indeed, the entire predicate of the *Griffin* decision was that "[p]robation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty," and that therefore the Constitution "permit[s] a degree of impingement upon privacy that would not be constitutional if applied to the public at large." 483 U.S. at 874, 875 (internal quotations omitted). The First Circuit's reliance on decisions from an administrative context is likewise unjustified, because this Court has unequivocally held that, even in an administrative context, a warrant *is* required to make a forcible entry into a home. *See Camara v. Municipal Court*, 387 U.S. 523, 540 (1967).

## I.

## THIS CASE RAISES AN ISSUE OF GREAT IMPORTANCE.

This case squarely raises an issue of great importance in Fourth Amendment jurisprudence — whether police officers must, *absent exigent circumstances*, obtain a warrant to enter a private residence to execute a civil commitment order. The decision below, which carves out a novel and unprecedented "special needs" exception to the warrant requirement, is a significant departure from this Court's settled understanding of Fourth Amendment law and will have a significant impact on the

hundreds of thousands of civil commitment proceedings instituted in the United States each year.

The decision of the First Circuit, for the first time in the history of American jurisprudence, authorizes the police, acting without a warrant, to break down the doors of citizens who have not committed — or even been alleged to have committed — any crime. The sole prerequisite for this violation of the privacy and sanctity of the home is the certificate of a doctor, psychologist or psychiatric nurse that attests that an individual presents a substantial risk of dangerousness due to mental illness. Under the Court of Appeals' decision, this determination of dangerousness need not be based upon probable cause, because such a requirement would unduly burden the state in its systemic response to the problem of dangerousness in the mentally ill. 77 F.3d at 550-551, 550 n.11.

Under the decision of the First Circuit, the sole role of the judiciary in reviewing the lawfulness of a forcible entry into a citizen's home is to determine whether the entry was authorized as part of a reasonable State program, as embodied in the State's civil commitment statute. Under the First Circuit's interpretation of the Fourth Amendment, if those statutes are reasonably related to legitimate State interests, then the policy of forcible entry is lawful. 77 F.3d at 550.

Twenty-six states besides Massachusetts have commitment statutes that authorize an emergency seizure of an individual if a mental health professional (not even necessarily a doctor) certifies that the individual is dangerous to himself or to others due to mental illness.[1] The decision below could permit police to

---

1. The state statutes included in the Appendix at 67a-68a allow emergency seizures of an individual based upon certification of an official (Cont'd)

execute a civil commitment order by a forcible home invasion in each of those jurisdictions. The most recent statistics compiled by the National Institute of Mental Health show that approximately 300,000 involuntary commitment proceedings are instituted annually.[2] Other empirical studies show that civil commitment proceedings overwhelmingly affect a population that is not only economically disadvantaged, but also mentally disabled.[3] As a result of these factors, the vast majority of the execution of such orders will not receive judicial scrutiny. This case therefore presents this Court with a unique opportunity to address this fundamental issue of Fourth Amendment law that has practical consequences for thousands of disadvantaged Americans in dozens of jurisdictions.

---

(Cont'd)
trained in the field of mental health. There is variety among the statutes concerning such issues as: (1) whether the risk of dangerousness is required to be imminent; (2) whether an examination is required prior to certification; (3) considerations relating to recency of examination and/or promptness of service of the commitment order; and (4) the identity and qualifications of the persons authorized to certify the need for a seizure. But under the First Circuit's permissive approach, orders issued under any of the statutes would authorize warrantless home entries.

2. *See*, Marilyn Rosenstein, *et al., U.S. Dept. of Health and Human Serv., Mental Health Statistical Note No. 178, Legal Status of Admission to Three Inpatient Psychiatric Settings 1-4 (1986)*, cited in John Q. LaFond and Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 Vill. L. Rev. 71, 105 n.176 (1994).

3. *See*, Virginia A. Hiday, *Civil Commitment: A Review of Empirical Research*, 6 Behav. Sci. & L. 15, 19 (1988); LaFond and Durham, *supra*, at 105-106.

## II.

## THE DECISION BELOW IS AN UNJUSTIFIED DEVIATION FROM CONSISTENT PRECEDENT.

The First Circuit erred in relying on administrative search cases such as *O'Connor v. Ortega*, 480 U.S. 709 (1987), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), to justify its creation of a new "special needs" exception to the warrant requirement for home entries. Both *O'Connor* and *T.L.O.* involved expectations of privacy and personal security far removed from those at stake in forcible home entries — *i.e.*, the expectation of privacy a government worker has in his office desk, (*O'Connor*), and that of a student in her pocketbook on school premises, (*T.L.O.*). Both decisions are expressly premised upon the limited nature of the expectation of privacy outside the home. As this Court stated in the *O'Connor* case: "Public employees' expectations of privacy in their office, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *O'Connor*, 480 U.S. at 717. The lower expectations of privacy in a school or workplace setting cannot compare to the near absolute expectation of privacy present in a home setting.

The First Circuit's reliance on *Wyman v. James*, 400 U.S. 309 (1971), is also inapposite as justification for a policy of forcible entry to the home. This Court in *Wyman* held that a welfare visit does not rise to the level of an intrusion subject to Fourth Amendment protection, because there is no compelled home entry: "We note, too, that the visitation itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search." *Id.* at 317. Thus, *O'Connor*, *T.LO*, *Wyman*, and

*Camara* all respect the "firm line" established in *Payton*: While a number of different factors are considered in cases involving searches outside a home *(O'Connor, TLO)*, the threshold of a home cannot be crossed without consent (*Wyman*) or a warrant (*Camara*).

The First Circuit's reliance on *Griffin v. Wisconsin, supra*, is likewise misplaced. The result in *Griffin* was expressly predicated on the fact that those convicted of criminal acts may be subjected to greater invasions of their privacy than to the public at large. *Griffin*, 483 U.S. at 874, 875. The privacy expectations of law-abiding citizens cannot be equated with those of convicted criminals.

In short, the decision below fails to recognize this Court's consistent fundamental precedents that accord the highest level of protection to the expectation of privacy in the home. Due to the unique protection afforded to the home, neither the *Griffin* decision nor cases involving searches outside the home are applicable. Instead, in the context of administrative searches this case is squarely governed by the *Camara* case, which expressly held that a warrant is required to compel entry to the home. *Camara*, 387 U.S. at 540.

## III.

## THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS.

In holding that the City's policy of permitting forcible, warrantless, entries into private residences to execute civil commitment orders is not unreasonable, the Court of Appeals rejected any need for a showing of probable cause before such orders are issued. "It is largely irrelevant whether the 'likelihood

of serious harm' criterion in Mass. Gen. Laws Ann. ch. 123, § 12(a), approximates the 'probable cause' inquiry appropriate in the search warrant context. The 'probable cause' inquiry often is jettisoned in civil administrative searches[.]" 77 F.3d at 550 n.11 (citing *O'Connor* and *T.L.O.* for the proposition that probable cause is not mandated). In place of the well-settled probable cause standard, the First Circuit ruled that involuntary commitment orders need only meet a standard of reasonableness. 77 F.3d at 551.

That holding stands in stark contrast to the rulings of every federal appellate court that has considered the question. Each of the following cases holds that an order authorizing the seizure of a person in the context of civil commitment proceedings must be based on probable cause: *Pino v. Higgs*, 75 F.3d 1461, 1468 (10th Cir. 1996); *Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir. 1993); *Villinova v. Abrams*, 972 F.2d 792, 795 (7th Cir. 1992); *Gooden v. Howard County, Md.*, 954 F.2d 960, 967-968 (4th Cir. 1992) (*en banc*); *Maag v. Wessler*, 960 F.2d 773, 775-776 (9th Cir. 1991); *Harris v. Pirch*, 677 F.2d 681, 686 (8th Cir. 1982); *In re Barnard*, 455 F.2d 1370, 1374 (D.C. Cir. 1971). The reasoning underlying these decisions is exemplified in the *Pino* case. There, the Tenth Circuit reasoned that because "a seizure of a person for an emergency mental health evaluation raises concerns that are closely analogous to those implicated by a criminal arrest, and both are equally intrusive," the probable cause standard must be applied to the issuance of an order authorizing seizure pursuant to a civil commitment statute. *Pino*, 75 F.3d at 1467-1468. It is important for this Court to grant certiorari to eliminate the conflict engendered by the decision below and to affirm that probable cause is required for the issuance of a civil commitment order.

## IV.

## THE REASONS FOR GRANTING CERTIORARI ARE EQUALLY OR MORE COMPELLING IN THIS CASE THAN IN *SOLDAL v. COOK COUNTY.*

The case for granting certiorari is at least as compelling in this case as it was in *Soldal v. Cook County*, 506 U.S. 56 (1992). Like this case, that case involved a 42 U.S.C. § 1983 claim that government agents violated the Fourth Amendment in a civil context. Like this case, *Soldal* squarely concerned a core protection of the Fourth Amendment — protection of the home. Like this case, the Court of Appeals below had created a new exception to that core protection. This Court granted certiorari in *Soldal* and reversed unanimously. It should do the same here.

In *Soldal*, the petitioners sought review on the issue of whether the seizure and removal of their trailer home constituted a "seizure" within the meaning of the Fourth Amendment. 506 U.S. at 60. Even the Court of Appeals below in that case recognized the issue to be a "novelty," *Soldal v. County of Cook*, 942 F.2d 1073, 1075 (7th Cir. 1991). There was no circuit split in that case and there was no indication that the unusual fact pattern (literal seizure of a home) was likely to recur with any frequency. Nonetheless, this Court granted certiorari and reversed with a strong reaffirmation of the principle that "at the very core of the Fourth Amendment stands the right of a man to be free from unreasonable governmental intrusion." 506 U.S. at 61 (internal quotations omitted).

The issue presented in this case is at least as important as that in *Soldal*. Unlike the "novel[ ]" fact pattern in that case, hundreds of thousands of involuntary civil commitment proceedings are instituted each year in this country. Prior to the

First Circuit decision, orders of civil commitment would not have authorized forcible, warrantless entries into homes. But under the First Circuit's approach, thousands of those orders will now allow circumvention of what *Payton* termed the "firm line" in Fourth Amendment law, that, "[a]bsent exigent circumstances, th[e] threshold [of a home] may not reasonably be crossed without a warrant." 445 U.S. at 590.

Indeed, the decision below departs from established precedent far more than the lower court decision did in *Soldal*. Even the Court of Appeals in *Soldal*, while attempting to adopt a "narrow reading of the [Fourth] Amendment" (506 U.S. at 62), nonetheless acknowledged that, even in the civil context, police officers could not invade the "privacy of the home." 942 F.2d at 1076. In particular, that Court of Appeals cited with favor (*see* 942 F.2d at 1076) the Tenth Circuit decision in *Specht v. Jensen*, 832 F.2d 1516 (10th Cir. 1987), *remanded on unrelated grounds*, 853 F.2d 805 (10th Cir. 1988) (*en banc*), which held that agents could not make a warrantless entry into a home to execute a court order of possession against certain personal property. The decision of the First Circuit allows a whole new category of invasions to the privacy of the home in a civil context and also conflicts with *Specht*.

*Specht* cannot be reconciled with the decision below unless the Fourth Amendment provides *less* security to people than to things. At least in *Specht*, the officers making the warrantless entry into a home had an order issued *by a court*. Still, the *Specht* court held that the warrantless entry into the home in an attempt to execute the order of possession against certain personal property was unconstitutional because it did not fit into any recognized exception to the Fourth Amendment warrant requirement. *See* 832 F.2d at 1522-23. In this case, the officers who kicked in the doors of Mrs. Zinger's home did not have any court order, but only a "pink paper," which, according to the First

Circuit, can be issued without probable cause by any physician, psychologist, or psychiatric nurse.

Finally, the interests at stake in this case are at least as great as those threatened in *Soldal*. The decision below, like that in *Soldal*, is a direct threat to "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origin of the Republic." *Payton*, 445 U.S. at 601; *see also Soldal*, 506 U.S. at 61 (collecting cases on protection of the home). Here, it is undisputed that Mrs. Zinger's home was violently entered. Although the constitutional violation in *Soldal* was very serious, at least the unconstitutional actions of the officers there did not actually invade the home.

As evidenced by the decision to grant certiorari and the unanimous reversal in *Soldal*, this Court has historically protected the sanctity of the home with vigor. This case warrants adherence to that tradition.

## CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES M. CAMPO, JR.
*Counsel of Record*
FLOYD H. ANDERSON, JR.
STEVEN M. BLOOM
KASSLER & FEUER, P.C.
*Attorneys for Petitioner*
101 Arch Street
Boston, MA 02110-1103
(617) 439-3800

## APPENDIX A — JUDGMENT AND MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED FEBRUARY 29, 1996

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1731

MARY MCCABE, ETC.,
Plaintiff, Appellee,

v.

LIFE-LINE AMBULANCE SERVICE, INC.,
Defendants-Appellees,

THE CITY OF LYNN,
Defendant, Appellant.

**JUDGMENT**

Entered: February 29, 1996

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court judgment is reversed and the case is remanded to the district court for further proceedings consistent with the opinion issued this date.

Costs to appellant.

**By The Court:**
WILLIAM H. NG, Clerk.

By s/ Mary E. C'Callaghan
Deputy Clerk

*Appendix A*

**United States Court of Appeals**
**For the First Circuit**

No. 95-1731

MARY McCABE, ETC.,

Plaintiff, Appellee,

v.

LIFE-LINE AMBULANCE SERVICE, INC.,

Defendants, Appellees,

---

THE CITY OF LYNN,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Nancy Gertner, *U.S. District Judge*]

Cyr, Boudin and Stahl,
*Circuit Judges.*

*Charles M. Burnim,* with whom *Michael J. Barry* and *George S. Markopoulos* were on brief for appellant.

*Charles M. Campo, Jr.,* with whom *Floyd H. Anderson* and *Kassler & Feuer, P.C.* were on brief for appellee McCabe.

*Appendix A*

February 29, 1996

**CYR, *Circuit Judge.*** In this appeal by the City of Lynn ("City"), we consider whether an established City policy, permitting forcible, warrantless entries of private residences to enforce involuntary civil commitment orders, violates the Fourth Amendment to the United States Constitution. The district court granted summary judgment for plaintiff Mary McCabe, administratrix of the estate of Ruchla Zinger, a Holocaust survivor who died in her Lynn home during a tragic attempt by City police to execute an involuntary commitment order which had been issued against her. For the reasons discussed in this opinion, we conclude that the challenged City policy came within an exception to the Fourth Amendment warrant requirement.

## I

## BACKGROUND

Ms. Zinger, a 64-year-old Lynn, Massachusetts, resident with a history of mental illness and psychiatric hospitalization, as well as severe obesity and high blood pressure, resisted all attempts at communication and intervention by family members. She refused to be examined by a doctor after threatening her former husband with physical harm and upsetting her downstairs neighbors by causing loud and violent disturbances in her apartment, thereby prompting her family to initiate eviction proceedings against her.[1] Subsequently, on September 6, 1989, a licensed psychiatrist, Dr. Yakov Barden, signed an application

---

1. Ms. Zinger's former husband and their children owned the building in which Ms. Zinger's apartment was located.

[hereinafter: "pink paper"] for a ten-day involuntary commitment of Ms. Zinger pursuant to Mass. Gen. Laws Ann. ch. 123, § 12(a), based exclusively on the reports of family members and neighbors as to Ms. Zinger's physical and behavioral symptoms.

The next morning, Constable Kenneth Jackson, who had been unsuccessful in previous attempts to serve Ms. Zinger with an eviction notice, and was scheduled to execute a judgment of eviction against her at 1:00 p.m. that afternoon, learned that the pink paper had been issued against Ms. Zinger the night before, and contacted the Lynn police department. The constable informed the Lynn police, based on his experience with Ms. Zinger, that he believed she would resist committal. The constable and the Lynn police officers arranged to meet at the Zinger apartment building at 1:00 p.m., to execute the pink paper and the eviction order.

Three Lynn police officers and the constable arrived at the Zinger apartment building at the appointed hour, accompanied by a crew from the Life-Line Ambulance Service, which had been engaged to restrain Ms. Zinger as necessary, physically remove her from the apartment, and transport her to the hospital. After receiving no response to their knocks, the officers kicked in the outside apartment-house door and proceeded upstairs to the Zinger apartment. The officers knocked and announced their presence, received no response, and began to kick in the Zinger apartment door. Ms. Zinger began screaming "Why are you kicking in my door?" then cracked it open. Identifying themselves as police, the officers told her that they were going to bring her under medical care, to which she responded: "No doctors!" When she began to close the door, the officers shoved their way inside. Later, while the officers were forcibly

removing her from the apartment, Ms. Zinger suffered a cardio-respiratory arrest and died.[2]

After McCabe, as administratrix, instituted this civil rights action under 42 U.S.C. § 1983 against the City, amongst others,[3]

---

2. The only constitutional violation McCabe attributes to the City is the forcible warrantless entry. In her cross-motion for summary judgment, McCabe did not press her "excessive force" claim that a City policy authorized or caused the police actions utilized to restrain Ms. Zinger. *See infra* note 4. We now summarize the allegations against the individual officers in order to provide additional context.

After the officers pushed their way into her apartment and Ms. Zinger began screaming, the officers forced her to the floor on her stomach and handcuffed her hands behind her back. She lost control of her bladder. The ambulance crew refused to carry her down the stairs, asserting that she was too heavy. The officers then placed her in a sitting position. With one officer gripping her ankles and another holding her under her handcuffed arms, she was carried to the stairs, then dragged down one step at a time while still in a sitting position. At the bottom, the ambulance crew strapped her onto the stretcher, face down. By this time she had stopped screaming and the officers noticed that her hands appeared blue and she was bleeding from her mouth. Ms. Zinger was pronounced dead on arrival at the hospital.

3. The judgment appealed from is nonetheless "final" as to all parties and claims. *See* Fed. R. Civ. P. 54(b); 28 U.S.C. § 1291. The original ten-count complaint named as defendants, the City, the dispatching police supervisor and the three individual police officers who executed the pink paper (in their official and individual capacities), the constable, the ambulance company, the ambulance crew, Dr. Barden, and the Tri-City Mental Health and Retardation Center where Dr. Barden worked. In addition to her claims under § 1983, McCabe alleged common-law assault and battery, and negligence. In June 1993, McCabe settled all claims against the doctor and the hospital. In February 1995, after a jury returned verdicts against the City and Life-Line Ambulance, the claims against the four police officers, the constable, and the ambulance crew were dismissed, without prejudice, by stipulation.

in September 1992, an amended complaint alleged an established City policy permitting police officers to execute pink papers by means of forcible, warrantless entries into private residences absent demonstrable exigent circumstances, and that this City policy proximately caused an actionable deprivation of Ms. Zinger's Fourth Amendment right to be free from unreasonable searches.[4] After hearing, the district court granted the McCabe cross-motion for summary judgment against the City on the issue of liability. *McCabe v. City of Lynn*, 875 F. Supp. 53, 63 (D. Mass. 1995). In the ensuing trial, the jury awarded $850,000 in damages against the City and $500,000 against Life-Line Ambulance. The City thereupon brought this appeal from the final judgment entered against it.

## II

## DISCUSSION

### A. *District Court Opinion*

The district court found that the City policy violated the Fourth Amendment, for the following reasons. The City's own policy expert attested that the City did not require its officers to obtain a search warrant before effecting a warrantless entry of a residence to execute a pink paper, leaving it instead to the discretion of the officers whether and when such a warrantless entry was necessary. *Id.* at 58. The district court noted that warrantless, nonconsensual entries into private residences are presumptively "unreasonable" under the Fourth Amendment, absent exigent circumstances. *Id.* at 58-59. Although imminent threats to the lives and safety of the police officers, or members

---

4. By contrast, the initial complaint had alleged a City policy permitting the use of excessive force, and a failure to train or supervise officers, in executing involuntary commitment seizures.

of the public, often give rise to exigent circumstances justifying an immediate warrantless entry, the court found that "the Lynn police acted with *leisure* in arranging a convenient time" to serve the pink paper upon Ms. Zinger, thereby belying any contention that " 'some real[,] immediate or serious consequences [would occur] if [the officers] postponed action to get a warrant.' " *Id.* at 59, 62 (citation omitted).

The district court nonetheless recognized that even absent exigent circumstances the warrant requirement may not be applicable in certain regulatory contexts wherein warrantless search procedures serve as invaluable "administrative tool[s]" and are "far less invasive" than searches directed at discovering evidence of crime. *Id.* at 59-60. The court identified two factors which weighed against a ruling that the challenged City policy came within this special regulatory category. First, unlike a judicial officer, the licensed medical-psychiatric physicians authorized to issue pink papers under Mass. Gen. Laws Ann. ch. 123, § 12(a), are "not qualified to determine whether probable cause exists." *Id.* at 61. Second, "the agents of the doctors in this case are police officers with guns and batons, not hospital orderlies and nurses," so that "[t]here is no therapeutic relationship which a warrant mechanism would disrupt." *Id.*

**B.** ***Standard of Review***

We review a grant of summary judgment *de novo,* to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Velez-Gomez v. SMA Life Assurance Co.,* 8 F.3d 873, 874-75 (1st Cir. 1993). All competent evidence and reasonable inferences therefrom are

viewed in the light most favorable to the party resisting summary judgment. *Id.*

**C. *Applicable Law***

A municipal liability claim under § 1983 requires proof that the municipality maintained a policy or custom which caused, or was the moving force behind, a deprivation of constitutional rights. *See, e.g., Oklahoma City v. Tuttle,* 471 U.S. 808, 819 (1985); *Monell v. Department of Social Servs.,* 436 U.S. 658, 694 (1978); *Bordanaro v. McLeod,* 871 F.2d 1151, 1156 (1st Cir.), *cert. denied,* 493 U.S. 820 (1989).

The Fourth Amendment applies not only to governmental searches and seizures in criminal investigations, but also in various *civil* proceedings. *See Soldal v. Cook County, Ill.,* 506 U.S. 56, __, 113 S. Ct. 538, 548 (1992); *O'Connor v. Ortega,* 480 U.S. 709, 715 (1987) ("[B]ecause the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,' . . . it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.' ") (quoting *New Jersey v. T.L.O.,* 469 U.S. 325, 335 (1985)). Included among the civil proceedings in which the Fourth Amendment applies are involuntary commitment proceedings for dangerous persons suffering from mental illness. *See Glass v. Mayas,* 984 F.2d 55, 58 (2d Cir. 1993); *Villanova v. Abrams,* 972 F.2d 792, 795-96 (7th Cir. 1992).

The fundamental inquiry under the Fourth Amendment is whether a particular search or search procedure is "reasonable" in the circumstances. *See Cady v. Dombrowski,* 413 U.S. 433,

439-40 (1973); *Wyman v. James*, 400 U.S. 309, 318 (1971); *Camara v. Municipal Ct. of San Francisco*, 387 U.S. 523, 538 (1967). Nonconsensual entries by government agents into a residence without a search or arrest warrant[5] are presumptively "unreasonable" under the Fourth Amendment. *See Welsh v. Wisconsin*, 466 U.S. 740, 748-49 (1984); *Payton v. New York*, 445 U.S. 573, 586 (1980); *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir.), *cert. denied*, 116 S. Ct. 675 (1995). This presumption is designed to safeguard the special privacy expectations traditionally recognized in the American home by requiring that a "neutral" and detached judicial officer make an independent assessment as to whether law enforcement agents have probable cause to effect an intended search or arrest within the home. *See Steagald v. United States*, 451 U.S. 204, 212 (1981). The warrant requirement is not absolute, of course, and the presumption may be overcome in at least two ways.

First, a warrantless entry and search of a residence may be "reasonable," in Fourth Amendment terms, if the government can demonstrate certain exceptional types of exigent circumstances: (1) "hot pursuit" of a felon into a residence; (2) imminent destruction of evidence within the residence; (3) a threatened and potentially successful escape by a suspect from inside the residence; or (4) an imminent threat to the life or safety of members of the public, the police officers, or a person located within the residence. *See United States v. Tibolt*, 72 F.3d 965, __ (1st Cir. 1995) [Nos. 94-1714 & 2221, 1995 WL 757848, at *3

---

5. "[A] [felony] arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603 (1980). *But see Steagald v. United States*, 451 U.S. 204, 214 (1981) (noting that the "arrest warrant" rule is inapplicable where suspect is within another person's residence).

(Dec. 29, 1995)]; *Hegarty*, 53 F.3d at 1374. Normally, "exigent circumstances" exceptions — by their very nature — turn upon the objective reasonableness of *ad hoc*, fact-specific assessments contemporaneously made by government agents in light of the developing circumstances at the scene of the search. *See id.* at 1378.

Second, a residential search pursuant to an established warrantless search *procedure* may be reasonable if conducted in furtherance of an important administrative or regulatory purpose, or "special need," which would be undermined *systemically* by an impracticable warrant or probable-cause requirement. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) ("[W]e have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'") (citation omitted). *See, e.g., id.* (upholding probation officers' prerogative to conduct warrantless searches of probationers' homes for evidence of probation infraction); *O'Connor*, 480 U.S. at 709 (noting that government employer's warrantless searches of employees' work space to recover work-related materials may be "reasonable" in particular circumstances); *T.L.O.*, 469 U.S. at 325 (holding that warrantless in-school searches of students' personal property by public school officials did not violate Fourth Amendment); *United States v. Cardona*, 903 F.2d 60 (1st Cir. 1990) (extending *Griffin* to parole officers' warrantless searches of parolees' residences), *cert. denied*, 498 U.S. 1049 (1991); *cf. Wyman*, 400 U.S. at 309 (holding that social worker's warrantless visitation to welfare recipient's home did not implicate Fourth Amendment). The reasonableness of a particular "special need" search procedure will depend, of course, on whether the court's "careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard that stops short of probable cause." *T.L.O.*, 469 U.S. at 341.

*Appendix A*

**D. *Alleged "Deprivation"***

Turning to the initial hurdle confronting McCabe under § 1983, *see Monell*, 436 U.S. at 694, we must determine whether the undisputed evidence demonstrates that the warrantless, forcible entry of the Zinger residence by the Lynn police constituted a deprivation of decedent's Fourth Amendment rights. Oddly, none of the cases the City cites as support for the constitutionality of comparable involuntary commitment statutes deals straightforwardly with the precise issue before us: whether a prescribed statutory search procedure (i.e., Mass. Gen. Laws Ann. ch. 123, § 12(a)) violates the Fourth Amendment because it routinely allows warrantless entries of a residence, absent "exigent circumstances," to effect involuntary commitments; nor have we found such a case. The cases cited by the City consider whether a seizure of the *person* effected pursuant to an involuntary commitment statute violates the *due process* requirements of the Fifth and Fourteenth Amendments,[6] or whether the manner in which the government detains a person violates the Fourth Amendment prohibition against unreasonable seizures.[7] Nonetheless, to the extent the

---

6. *See, e.g., Project Release v. Prevost*, 722 F.2d 960, 963 (2d Cir. 1983) (involving a Fourteenth Amendment "due process" challenge to the New York involuntary commitment statute).

7. *See Moore v. Wyoming Medical Ctr.*, 825 F. Supp. 1531, 1535, 1537 (D. Wyo. 1993) (focusing on "seizure" of person subjected to involuntary commitment, and noting only in passing that seizure followed a forcible warrantless entry of the home); *see also Glass*, 984 F.2d at 58 (holding that the committing physicians were entitled to qualified immunity for ordering "seizure" because they reasonably believed that subject was mentally ill and "dangerous"); *Villanova*, 972 F.2d at 797 (discussing Fourth Amendment and due process implications arising from prolongation of involuntary commitment, or seizure of the person, without independent judicial

(Cont'd)

technically inapposite "seizure" cases relied on by the City might be considered appropriate analogs in this unchartered area, we consult their reasoning for guidance.

Although the parties devote considerable attention to whether there remains a genuine factual dispute regarding the substance of the challenged City "policy," we consider its essential features clear enough; that is, the policy permits warrantless residential searches, without requiring "exigent circumstances," in order to effect an involuntary commitment pursuant to a properly issued pink paper. Of course, the City argues that every entry is *per se* "exigent" since a pink paper can only issue upon an expert medical finding that the subject presently poses a "likelihood of serious harm" to herself or others, which in turn provides the police with reasonable cause to believe that an immediate, forcible entry for the purpose of

---

(Cont'd)

determination of probable cause, where commitment occurred while person was in *jail*).

Moreover, the absence of any authority for the McCabe contention — that the warrantless "forcible entry" phase of an involuntary commitment should be treated differently than the committal "seizure" itself — arguably indicates that a constitutional foundation is lacking. *See Cardona*, 903 F.2d at 64 (rejecting similar attempt to draw "entirely artificial distinction[s] between 'search' jurisprudence and 'seizure' jurisprudence"). And since the cases cited by the City overwhelmingly hold that warrantless, involuntary commitment seizures generally comport with the strictures of the Fourth Amendment, *see Villanova*, 972 F.2d at 795 ("There is no requirement of a warrant issued by a judicial officer [to seize the person subject to a commitment order]."), thus constituting a valid pink paper the practical equivalent of an arrest warrant, *see supra* note 5; *cf. Welsh*, 466 U.S. at 748-49; *Payton*, 445 U.S. at 586; *Hegarty*, 53 F.3d at 1373, a separate requirement that a search warrant be obtained before entering the residence to seize the subject could be viewed as supererogatory.

detaining the resistant subject is necessary to avert the "serious harm's identified in the pink paper.

On the other hand, McCabe contends that these remote medical-psychiatric "emergency" determinations do not equate with constitutionally cognizable "exigent circumstances," because they do not turn on the executing officer's fact-specific, on-the-scene assessment as to the immediacy of any putative threat the subject may pose to herself or others. McCabe stresses that during the several hours which were allowed to elapse before the pink paper was executed upon Ms. Zinger, the officers would have had ample time to obtain a search warrant. And McCabe points out that none of the four recognized "exigent circumstances," *see supra* p. 10, was plainly present immediately before the forcible police entry.

As these claims reflect the legal gloss placed on the record evidence, rather than a genuine factual dispute concerning the substance of the City policy, we need not enter the skirmish over the distinctions between "emergencies" and "exigent circumstances." The City policy, as evidenced by the actual conduct of its police officers,[8] falls squarely within a recognized class of *systemic* "special need" searches which are conducted without warrants in furtherance of important administrative purposes. Again, the fundamental concern of Fourth

---

8. Contrary to McCabe's contention, we need not decide whether the City waived the argument that its police officers' actions were not undertaken pursuant to City policy, and that it is therefore not liable under *Monell*, 436 U.S. at 694. The City merely argues that the actual police conduct in effecting a warrantless entry often provides the best circumstantial evidence as to the nature of the challenged municipal policy. *See Bordanaro*, 871 F.2d at 115657 (observing that the event itself is evidence that police officers acted in accordance with municipal policy).

Amendment jurisprudence in general, and in "special need" search cases as well, is whether an established search procedure is "reasonable" in light of the actual circumstances in the particular case. *See Cady*, 413 U.S. at 439-40; *see also O'Connor*, 480 U.S. at 719; *T.L.O.*, 469 U.S. at 337. "Reasonableness," in turn, depends on " 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *O'Connor*, 480 U.S. at 719 (citation omitted); *see T.L.O.*, 469 U.S. at 341; *Cardona*, 903 F.2d at 67; *cf. Villanova*, 972 F.2d at 796. On balance, we find that the City policy permitting forcible, warrantless entries by police officers in possession of a pink paper properly issued pursuant to Mass. Gen. Laws Ann. ch. 123, § 12(a), is reasonable under the Fourth Amendment.

**1. *State's "Administrative" Interest***

**(a) *Parens Patriae and Police Power***

The legitimacy of the State's *parens patriae* and "police power" interests in ensuring that "dangerous" mentally ill persons not harm themselves or others is beyond dispute. *See Rogers v. Okin*, 634 F.2d 650, 654 (1st Cir. 1980), *rev'd on other grounds*, 457 U.S. 291 (1982); *Thompson v. Commonwealth*, 438 N.E.2d 33, 36 (Mass. 1982). The potential consequences attending a delayed commitment both to the mentally ill subject and others — may be extremely serious, sometimes including death or bodily injury. Thus, we think it is especially significant to the present analysis that warrantless "special need" searches have been condoned by the courts in circumstances where the State interests were far less compelling and urgent. *Cf., e.g., O'Connor*, 480 U.S. at 724 (noting: because "public employees

are entrusted with tremendous responsibility," "the consequences of their misconduct or incompetence to both the agency and the public interest can be severe"); *New York v. Burger*, 482 U.S. 702, 708-09 (1987) (noting: where "the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable[,]" and that "the State has a substantial interest in regulating the vehicle-dismantling and automobile-junkyard industry because motor vehicle theft has increased in the State and because the problem of theft is associated with this industry"); *T.L.O.*, 469 U.S. at 339 ("Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.").

We therefore inquire whether these residential search procedures are appropriately tailored to the legitimate and important interests at stake; in other words, whether the procedures are reasonably designed to ensure accurate identification and prompt detention of recalcitrant and "dangerous" mentally ill persons who require immediate temporary commitment. *See id.* at 341 (noting two-part inquiry whether the search procedure was (i) " 'justified at its inception' " and (ii) " 'reasonably related in scope to the circumstances which justified the interference in the first place' ") (citations omitted).[9] We think that Mass. Gen. Laws Ann. ch. 123, § 12(a), in general, and the commitment order issued by Dr. Barden, in particular, were appropriately suited to these legitimate purposes.

---

9. Thus, a "mental illness" determination alone is insufficient to support an involuntary commitment order; the State must also show that the person subjected to involuntary commitment is "dangerous." *See O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975).

*Appendix A*

The application for temporary hospitalization, signed by Dr. Barden, expressly referenced Mass. Gen. Laws Ann. ch. 123, § 12(a), which authorizes four categories of involuntary commitment procedures:

> (1) a qualified physician, psychologist, or psychiatric nurse who has personally examined a person, and who has reason to believe that the person would create a "likelihood of serious harm," may sign a "pink paper" authorizing law enforcement officials to restrain that person to permit hospitalization for up to a ten-day period;
>
> (2) in an "emergency situation," a qualified physician, psychologist, or psychiatric nurse may sign a pink paper, even when the alleged mentally ill person refuses to submit to a medical examination, if the "facts and circumstances" suggest that the person would create a "likelihood of serious harm";
>
> (3) in an "emergency situation," a police officer may restrain a person he believes creates a "likelihood of serious harm,)' if no qualified physician, psychologist, or psychiatric nurse is available to sign a pink paper; or
>
> (4) at any time, any person may apply to the district or juvenile courts for a

> commitment order, and after a hearing, the court may issue a warrant for the apprehension and appearance of the person who creates a "likelihood of serious harm."

Mass. Gen. Laws Ann. ch. 123, § 12(a); *see infra* Appendix, for text; *see generally Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 258-60 (1st Cir. 1994) (tracing history of Massachusetts emergency involuntary commitment procedure from colonial times through enactment of chapter 123). As only the category 4 commitment procedure expressly incorporates a warrant requirement, we think it clear that the statute implicitly authorizes warrantless searches and seizures in the three remaining contexts. Since Ms. Zinger repeatedly rejected family pleas that she submit to examination by a physician, and because Dr. Barden based his expert medical-psychiatric opinion exclusively on reports from family members and neighbors, we conclude also that the pink paper in this case did issue under category 2. The only question before us, therefore, concerns the constitutionality of the "category 2" warrantless search procedure.

The pink paper was based on Dr. Barden's expert opinion that Ms. Zinger "require[d] hospitalization so as to avoid the likelihood of serious harm by reason of mental illness." Dr. Barden described the particular grounds for concluding that immediate hospitalization was required:

> [Patient] has a [history] of mental illness and she was hospitalized at Danvers [State] Hospital couple of years ago. [Patient] is very angry and hostile; she is very impulsive and

> explosive. She made threats to harm her axhusband. [Patient] is dangerous to others.

The involuntary commitment application, and the Massachusetts statute, define "likelihood of serious harm" — the governing criterion for commitment — as:

> (1) a substantial risk of physical harm to the person [her]self as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person [her]self as manifested by evidence that such person's judgment is so affected that [s]he is unable to protect [her]self in the community and that reasonable provision for h[er] protection is not available in the community.

Mass. Gen. Laws Ann. ch. 123, § 1; *see Rogers*, 634 F.2d at 658. The relevant medical history, including Ms. Zinger's history of mental illness and prior hospitalization at Danvers State Hospital, and the behavioral symptoms reported to Dr. Barden by family members, plainly satisfied the second clause in the statutory definition of "likelihood of serious harm."

The statutory definition of "likelihood of serious harm," particularly its requirement that there be objective medical

indicia of "dangerousness," effectively "constitutes a codified set of 'exigent circumstances' which are constitutional under the Fourth Amendment." *Moore v. Wyoming Medical Ctr.*, 825 F. Supp. 1531, 1538 n.4, 1546 (D. Wyo. 1993). Given the notorious difficulties in predicting individual human behavior based solely on symptomatology, *id.* at 1539, we conclude that Mass. Gen. Laws Ann. ch. 123, § 1, prescribes a sufficiently clear and reasonably reliable administrative standard for ensuring that involuntary commitments are limited to imminently "dangerous" mentally ill persons in emergent circumstances.

Finally, the specific focus and overall context of the Massachusetts statute implicitly circumscribe the category 2 search procedure within narrow bounds. A police officer is permitted to enter a residence without a warrant for the exclusive purpose of detaining a recalcitrant and dangerous mentally ill person pursuant to a duly issued pink paper, but may not engage in a generalized search. As the officers in the instant case did not exceed these bounds, we conclude that Mass. Gen. Laws Ann. ch. 123, § 12(a), and consequently the City policy in pursuance of the statutory design, *see supra* pps. 12-14, are appropriately tailored to serve the legitimate and important State and municipal interest in ensuring that dangerous mentally ill persons not cause physical harm to themselves or others.

**(b)** ***Practicality of Warrant Requirement***

The determination that there exists a legitimate and substantial governmental interest in conducting a warrantless search in certain circumstances satisfies only the threshold inquiry under the reasonableness test. For an administrative search procedure to survive constitutional challenge under the "special need" exception, it must also appear that the burdens of

complying with a warrant requirement are likely to defeat the important governmental purposes the warrantless search procedure was designed to serve.

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

*Camara*, 387 U.S. at 533.

Compliance with a warrant requirement in the context of these temporary, involuntary commitments for medical-psychiatric examination would entail critical delays in safeguarding the mentally ill person, and others, without affording commensurate privacy protections to the subject. Category 2 searches foster important governmental interests largely because the inherent imprecision in predicting the timing of any outbreak of "dangerousness" on the part of the recalcitrant, mentally ill person, *see Moore*, 825 F. Supp. at 1539, inevitably means that the time spent securing judicial approval of a pink paper represents a potentially dangerous delay of *incalculable* proportion.

In this particular case, of course, McCabe points to the undisputed evidence that the police officers waited several hours before executing the pink paper, thus demonstrating little concern that Ms. Zinger might exhibit the sort of sudden onset of

"dangerousness" alluded to in the assessment made by Dr. Barden. Although this argument might hold sway were the constitutionality of the warrantless entry dependent on an *ad hoc*, on-the-scene "exigent circumstances" determination made by the police, it is no rejoinder to the claimed "reasonableness" of a "special need" search procedure policy, which must focus not on the particular case but on the essential systemic attributes of the search procedure itself:

> The dissent argues that in this case the police had ample time to secure an arrest warrant, rendering invalid any claim that complying with traditional fourth amendment requirements was impracticable. That viewpoint distorts *Griffin's* "impracticability" prong. In *Griffin*, the Court inquired into the *systemic impracticability* of compelling those involved in implementation of a probation regime to obtain warrants. The impracticability of obtaining a warrant in the *particular case* did not enter into the equation; indeed, Justice Blackmun argued unsuccessfully for much the same sort of particularized inquiry . . . . Whether it was feasible for the police to obtain a warrant in this particular case is irrelevant for the purpose at hand.

*Cardona*, 903 F.2d at 68 n.7 (emphasis added; citations omitted).[10] Although the Fourth Amendment warrant

---

10. There is no record evidence that the challenged City policy required officers to execute pink papers within a specified time. In all events, however, (Cont'd)

requirement imposes a minimal burden on governmental authorities in normal circumstances, we think there can be little doubt that it would delay the execution of involuntary commitment orders to *some* degree in *all* cases, thereby appreciably increasing the systemic risk that the vital protective purposes served by the State's *parens patriae* and "police power" responsibilities would be frustrated in individual cases not identifiable in advance. *See supra* Section II.D.1(a).

More importantly by far, however, the additional burdens imposed on the City and State by a universal warrant requirement in category 2 searches seem to us "undue" and "unreasonable" when viewed in relation to the minimal additional protection afforded by a requirement that a pink paper be screened by a magistrate before it is executed. The district court ruled that the Fourth Amendment warrant requirement was violated notwithstanding compliance with the "pink paper" procedure under Mass. Gen. Laws Ann. ch. 123, § 12(a), because the issuing physician "is not qualified to determine whether probable cause exists." *McCabe*, 875 F. Supp. at 61. On the other hand, the Supreme Court has noted that rigid adherence to a warrant requirement reaches its most suspect extreme where a judicial

---

(Cont'd)

we do not think the several hours that elapsed between the issuance and execution of this pink paper, which enabled the constable and police to coordinate their actions, can be considered so inordinate as to call into question the emergent nature of Ms. Zinger's mental-health-related dangerousness. Whereas delay might belie "exigent circumstances," were that the warrant exception primarily relied upon by the City, no such rigid time constraints can be imposed in a particular "special need" case as a precondition to the validity of the systemic search procedure itself. Nonetheless, we express no opinion as to whether, in another case, inordinate delay in issuing and executing a pink paper might tend to undermine a predicate finding that the subject posed a real "likelihood of serious harm" at the time the finding was made.

officer lacks the innate expertise to assess the soundness of the basic ground upon which the warrant request is predicated. *See, e.g., Griffin,* 483 U.S. at 879 n. 6 (observing that "[o]ur discussion pertains to the reasons generally supporting the proposition that the search decision should be left to the expertise of probation authorities rather than a magistrate"); *cf. Rogers,* 634 F.2d at 660 ("While judicial determinations are certainly preferable in general, room must be left for responsible state officials to respond to exigencies that render totally impractical recourse to traditional forms of judicial process. 'The judicial model of fact finding for all constitutionally protected interests, regardless of their nature, can turn rational decision-making into an unmanageable enterprise.' ") (quoting *Parham v. J. R.,* 442 U.S. 584, 608 n. 16 (1979)).

A pink paper is issued or withheld principally on the strength of expert medical-psychiatric assessments (i.e., diagnoses and prognoses founded on the available evidence), whereas judicial officers normally are called upon to make judgments as to whether there is "probable cause" for an arrest or search. As the Second Circuit has pointed out:

> "[T]he initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question — did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy

> turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists."

*Project Release v. Prevost*, 722 F.2d 960, 972-73 (2d Cir. 1983) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)); *see also O'Connor*, 480 U.S. at 723 ("Indeed, it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search is to retrieve a file for workrelated reasons."); *Wyman*, 400 U.S. at 324 (in the home-visitation setting, "the warrant argument is out of place" since, as a practical matter, "probable cause" is more than an agency seeks or needs to know).[11]

---

11. It is largely irrelevant whether the "likelihood of serious harm" criterion in Mass. Gen. Laws Ann. ch. 123, § 12(a), approximates the "probable cause" inquiry appropriate in the search warrant context. The "probable cause" inquiry often is jettisoned in civil administrative searches:

> "[W]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." We have concluded, for example, that the appropriate standard for administrative searches is not probable cause in its traditional meaning. Instead, an administrative warrant can be obtained if there is a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied.

*O'Connor*, 480 U.S. at 722-23 (citations omitted); *see also T.L.O.*, 469 U.S. at 340-41 (" '[P]robable cause' is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.' ") (citations omitted).

To be sure, judicial oversight might provide some preliminary insulation against obvious abuse; for example, by screening out patently unreliable information utilized by a physician in formulating a diagnosis or prognosis, which can be a matter of particular concern in category 2 cases where the physician has not examined the patient and must rely on secondhand reports as to the subject's physical, emotional and behavioral symptoms. On the other hand, the statutory mechanism itself affords reasonable safeguards against such concerns: a pink paper can be authorized only by a licensed psychiatric physician, see Mass. Gen. Laws Ann. ch. 123, §§ 1, 12(a), whose extensive education and specialized experience and training should enable the psychiatric physician more reliably to parse such lay reports, especially those provided by family members, with the requisite professional skepticism.[12] Though this safeguard is by no means foolproof, we think it would be the exceptional case in which an expert evaluation was based on *patently* insufficient or unreliable information. Further, to the degree that judicial factfinding were thought to be necessary as a general rule, in order to ferret out *latent* unreliability in the foundational evidence (e.g., possible ulterior family motives or antipathy toward the patient) upon which

---

12. The other statutory safeguards would not forestall improper warrantless entries of a subject's residence. *See Cardona*, 903 F.2d at 66 ("While the actual invasion of privacy does not occur until the search or seizure occurs, the constitutional protection is viable only to the extent that it restricts the authority responsible for making the search or seizure decision, prior to the time the decision crystallizes."). Nonetheless, the other safeguards do mitigate any resulting injury to the subject. For example, in order to detain a dangerous mentally ill person for more than ten days, the State must petition the district court, and prove beyond reasonable doubt that the patient poses a "likelihood of serious harm." *See* Mass. Gen. Laws Ann. ch. 123, §§ 7, 8 (requiring ongoing, periodic judicial review of commitment decision), 12(d); *Commonwealth v. Nassar* 406 N.E.2d 1286, 1290-91 (Mass. 1980).

expert psychiatric evaluations are based, the resulting delays in implementing involuntary commitment orders could have far more serious consequences for the mentally ill, their families, and members of the public. Finally, such a detailed factfinding mission would greatly exceed any "screening" function normally undertaken by judicial officers in reviewing search warrant applications.

We discern no sufficient justification for superimposing such a judicial factfinding mechanism upon the evaluation made by the licensed psychiatric physician in the involuntary commitment context, especially since it promises no corresponding systemic benefit to offset the systemic delays in executing pink papers in emergent circumstances. *See Griffin*, 483 U.S. at 876 ("A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires.").

**2. *The Interests of the Mental Ill***

Next, we consider the extent to which the category 2 search procedure infringes legitimate Fourth Amendment interests of the mentally ill. *See T.L.O.*, 469 U.S. at 341; *cf. also, Rockwell*, 26 F.3d at 256 ("Involuntary confinement for compulsory psychiatric treatment is a 'massive curtailment of liberty.' ") (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)) (citation omitted). We point out again, however, that McCabe presently challenges only the alleged infringement of Ms. Zinger's Fourth Amendment right to be free from unreasonable governmental entries to her residence, *see supra* note 2, and does not allege an infringement of her liberty interest to be free from any unreasonable governmental restraint attending the subsequent seizure of her person.

*Appendix A*

(a) ***Civil Context***

Although the Fourth Amendment is implicated in a variety of civil proceedings, *Soldal*, 113 S. Ct. at 548, the Supreme Court has made it clear that the civil nature of certain search procedures may call for a narrowed application of the warrant and probable cause requirements. Where a search procedure is not designed to gather information in a criminal investigation, its relative unintrusiveness may militate in favor of relaxing the warrant requirement. *See O'Connor*, 480 U.S. at 721 ("While police, and even [some] administrative enforcement personnel, conduct searches for the primary purpose of obtaining evidence for use in criminal or other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate workrelated reasons wholly unrelated to illegal conduct."); *Wyman*, 400 U.S. at 323 (home visitation program "does not deal with crime or with the actual or suspected perpetrators of crime," and "[t]he caseworker is not a sleuth but rather, we trust, . . . a friend to one in need"); *see also Project Release*, 722 F.2d at 972-73 ("[T]he difference between civil and criminal confinement may nonetheless be reflected in different standards and procedures applicable in the context of each of the two systems — so long as due process is satisfied.") (citing *Addington*, 441 U.S. at 425). In the instant case, McCabe has not suggested that the challenged entry of the Zinger residence was effected for any criminal law purpose, or any regulatory purpose other than to enable her temporary hospitalization and the psychiatric examination she adamantly refused.

(b) ***Impartiality of Decisionmaker***

Finally, it is most significant in the present context that the official decision to initiate an involuntary "category 2"

commitment rests with a licensed psychiatric physician, not with law enforcement officials. *See Steagald*, 451 U.S. at 212 (noting that the Fourth Amendment warrant requirement interposes "neutral" and detached judicial officer between police and "probable cause" determination). The Supreme Court consistently premises "special need" warrant exceptions on the presence of a search authorization by an impartial, or at least a relatively impartial person. *See Cardona*, 903 F.2d at 64-65 ("The [*Griffin*] Court's focus was on the degree of security inherent in allowing a particular decisionmaker, i.e., a probation officer, to make a particular decision, i.e., whether a probationer's home should be searched, based on a particular (relatively modest) level of proof, i.e., 'reasonable grounds.' "). Unlike the characteristic relationship between law enforcement personnel and criminal suspects, a committing physician's relationship with a patient, or even a nonpatient, is in no sense adversarial.

The role of the licensed physician under Massachusetts law is to provide a neutral, objective assessment of the "dangerousness" and "likelihood of serious risk" criteria upon which the involuntary commitment decision depends. A physician's ethical responsibilities likewise require that appropriate medical-psychiatric criteria be utilized in assessing the condition of the subject person. *Cf., e.g., Griffin*, 483 U.S. at 876 ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen. He is an employee of the State Department of Health and Social Services who, while assuredly charged with protecting the public interest, is also supposed to have in mind the welfare of the probationer."). Nor is there any allegation or evidence that the Lynn police possessed or exercised any influence, direct or i indirect, over the

medical-psychiatric decision to issue the pink paper. *Cf. T.L.O.*, 469 U.S. at 337 n.5 ("Nor do we express any opinion on the standards (if any) governing searches of such areas by school officials or by other public authorities acting at the request of school officials.").

The district court nonetheless struck down the City policy because "the agents of the doctors in this case are police officers with guns and batons, not hospital orderlies and nurses," so that "[t]here is no therapeutic relationship which a warrant mechanism would disrupt." *McCabe*, 875 F. Supp. at 61.[13] Whether an administrative search procedure leaves too much discretion to law enforcement officers in the field is a recurring Fourth Amendment concern. *See, e.g., Camara*, 387 U.S. at 532-33 ("The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."). Under Mass. Gen. Laws Ann. ch. 123, § 12(a), however, the decision to conduct a category 2 "search" is never left to the executing officers. Moreover, the mere fact that law enforcement officials

---

13. Although there is no evidence that Dr. Barden had been Ms. Zinger's regular physician, the challenged City policy is to be evaluated in light of its systemic traits and purposes. *Cf. Cardona*, 903 F.2d at 67; *supra* pp. 22-23. No doubt many, if not most, category 2 searches are executed pursuant to pink papers issued by the subject-patient's current or former psychiatric physician. Unlike law enforcement officers, who rarely interact with a search target on more than one occasion, as a rule physicians possess reliable personal knowledge of their patients, based on an ongoing doctor-patient relationship. *Cf. Griffin*, 483 U.S. at 879 ("As was true, then, in [*O'Connor*] . . . and [*T.L.O.*], we deal with a situation in which there is an ongoing supervisory relationship — and one that is not, or at least not entirely, adversarial — between the object of the search and the decisionmaker.").

serve as the agents who implement the authorizing physician's decision to approve a category 2 search does not necessarily mean that the procedure is not within the "special need" category:

> [W]e fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted to conduct the § 415-a5 inspection. The significance respondent alleges lies in the role of police officers as enforcers of the penal laws and in the officers' power to arrest for offenses other than violations of the administrative scheme. It is, however, important to note that state police officers, like those in New York, have numerous duties in addition to those associated with traditional police work. . . . As a practical matter, many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. In sum, we decline to impose upon the States the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.

*Burger*, 482 U.S. at 717-18; *Cardona*, 903 F.2d at 65 ("The [*Griffin*] Court did not lend any special salience to the identity of

the person(s) executing the search"; "[w]hether the decision, once reached [by the probation officer], is realized through police officers, parole officers, or a tag team representing both camps, is peripheral to the Court's holding.").

We conclude that these considerations, on balance, favor a limited "special need" exception to the warrant requirement in the particular setting presented in this case. Accordingly, we hold that the Fourth Amendment is not infringed by the challenged City policy, which authorizes warrantless entries of residences by the police for the sole purpose of executing a properly issued category 2 pink paper within a reasonable time after its issuance.

## III

## CONCLUSION

We retrace the bounds of our ruling. We do not suggest that the factors we have discussed, *see* Section II.D, alone or in combination invariably provide adequate support for a "special need" exception to the warrant requirement. The balancing test for determining whether an administrative procedure comes within the "special need" exception is designedly fact-specific, and must be calibrated anew in assessing the reasonableness of each administrative search procedure to which it is applied. Nor, of course, do we suggest that all comparable state involuntary commitment statutes, or any other provision of Mass. Gen. Laws Ann. ch. 123, or other categories of searches authorized under chapter 123, section 12(a), necessarily satisfy the Fourth Amendment. *See, e.g., Wyman,* 400 U.S. at 326 ("Our holding today does not mean . . . that a termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances. The early

morning mass raid upon homes of welfare recipients is not unknown."). We hold only that law enforcement officers in possession of a pink paper, duly issued pursuant to category 2, Mass. Gen. Laws Ann. ch. 123, § 12(a), may effect a warrantless entry of the subject's residence within a reasonable time after the pink paper issues.

Since the challenged City policy comports with the "special need" exception to the Fourth Amendment warrant requirement, the City is entitled to summary judgment. We intimate no viewpoint concerning any other aspect of these proceedings, including the McCabe claims against the individual police officers, the constable, and the ambulance crew, which claims were dismissed, without prejudice. *See supra* note 3.

***The district court judgment is reversed and the case is remanded to the district court for further proceedings consistent with this opinion; costs to appellant.***

*Appendix A*

## APPENDIX

Chapter 123, Section 12:

(a) Any physician who is licensed pursuant to section two of chapter one hundred and twelve or qualified psychiatric nurse mental health clinical specialist authorized to practice as such under regulations promulgated pursuant to the provisions of section eighty B of said chapter one hundred and twelve or a qualified psychologist licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive of said chapter one hundred and twelve, who after examining a person has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a ten day period at a public facility or at a private facility authorized for such purposes by the department.

If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist on the basis of the facts and circumstances may determine

that hospitalization is necessary and may apply therefore.

In an emergency situation, if a physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist is not available, a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a ten day period at a public facility or a private facility authorized for such purpose by the department. An application for hospitalization shall state the reasons for the restraint of such person and any other relevant information which may assist the admitting physician or physicians. Whenever practicable, prior to transporting such person, the applicant shall telephone or otherwise communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person and also to give notice of any restraint to be used and to determine whether such restraint is necessary.

. . . .

(e) Any person may make application to a district court justice or a justice of the juvenile court department for a ten day

commitment to a facility of a mentally ill person whom the failure to confine would cause a likelihood of serious harm. After hearing such evidence as he may consider sufficient, a district court justice or a justice of the juvenile court department may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper. Following apprehension, the court shall have the person examined by a physician designated to have the authority to admit to a facility or examined by a qualified psychologist in accordance with the regulations of the department. If said physician or qualified psychologist reports that the failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness, the court may order the person committed to a facility for a period not to exceed ten days, but the superintendent may discharge him at any time within the ten day period.

## APPENDIX B — CORRECTED MEMORANDUM AND DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED FEBRUARY 2, 1995

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

**C.A. No. 92-12179-NG**

**MARY MCCABE, as Administratrix of the Estate of Ruchla "Rose" Zinger,**

**Plaintiff,**

**v.**

**THE CITY OF LYNN, SERGEANT RICHARD DONNELLY, a Sergeant in the Lynn Police Department, Individually, OFFICER GARY TWYMAN, an officer in the Lynn Police Department, OFFICER WILLIAM ALPHEN, an officer in the Lynn Police Department, Individually, CAPTAIN CSUKA, a Captain in the Lynn Police Department, Individually, and in his Official Capacity, YAKOV BARDEN, M.D., TRI-CITY MENTAL HEALTH HOSPITAL, JOHN DOE, Superintendent, Tri-City Mental Health Hospital, DAVID RANDO, EDWARD MARTICIO, LIFE-LINE AMBULANCE SERVICE, INC., and KENNETH JACKSON,**

**Defendants.**

**GERTNER, D.J.**

The following is a corrected version of the Memorandum and Decision issued on January 26, 1995. This version differs from the original only insofar as typographical and sentence structure errors have been corrected.

**Dated:** February 2, 1995

*Appendix B*

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

**C.A. No. 92-12179-NG**

**MARY MCCABE, as Administratrix of the Estate of Ruchla "Rose" Zinger,**

**Plaintiff,**

**v.**

**THE CITY OF LYNN, SERGEANT RICHARD DONNELLY, a Sergeant in the Lynn Police Department, Individually, OFFICER GARY TWYMAN, an officer in the Lynn Police Department, OFFICER WILLIAM ALPHEN, an officer in the Lynn Police Department, Individually, CAPTAIN CSUKA, a Captain in the Lynn Police Department, Individually, and in his Official Capacity, YAKOV BARDEN, M.D., TRI-CITY MENTAL HEALTH HOSPITAL, JOHN DOE, Superintendent, Tri-City Mental Health Hospital, DAVID RANDO, EDWARD MARTICIO, LIFE-LINE AMBULANCE SERVICE, INC., and KENNETH JACKSON,**

**Defendants.**

**CORRECTED MEMORANDUM AND DECISION**

**GERTNER, D.J.**

*Appendix B*

## CORRECTED MEMORANDUM AND DECISION

**FEBRUARY 2, 1995**

## I. INTRODUCTION

This case involves Rose Zinger who survived the Holocaust only to die at the hands of the Lynn Police. At issue is the policy of the Lynn Police to forcibly enter individuals' homes to serve involuntary commitment[1] orders, without a warrant, and solely on the authority of the officers on the scene. I find that this policy violates the Fourth Amendment's plain prohibition against the warrantless searches of homes, and seizures of persons.

After obtaining an order of involuntary commitment for Ms. Rose Zinger (a resident of Lynn), the Lynn Police served the order by breaking down her door and forcing her down a flight of stairs. Tragically, during this incident Ms. Zinger suffered a heart attack and died.

On September 4, 1992, the Administratrix of Ms. Zinger's estate (plaintiff Mary McCabe) filed a complaint seeking relief under 42 U.S.C. § 1983 and certain common law claims against the defendants City of Lynn and various individual officers for the death of Ruchla "Rose" Zinger (hereafter "Zinger"). In addition, plaintiff sued Life-Line Ambulance Service, Inc. (hereinafter "Life-Line Ambulance"), two of its emergency medical technicians (hereinafter "EMTs") and a number of other defendants on common law negligence, assault and battery

---

1. I use the phrases "involuntary commitment" and "civil commitment" interchangeably to deal with proceedings under M.G.L. ch. 123 § 12.

theories.[2] The motions for summary judgment concern only the civil rights claims against the City of Lynn and the negligence claims against the two EMTs of Life-Line Ambulance.[3]

---

2. The complaint alleged that: (1) Lynn Police Sergeant Donnelly and Officers Twyman and Alphen deprived Ms. Zinger of her constitutional rights in violation of 42 U.S.C. § 1983 (Count I); (2) Captain John Csuka deprived Zinger of her constitutional rights in violation of 42 U.S.C. § 1983 by failing to supervise the officers under his direction (Count II); (3) the City of Lynn maintained a policy which deprived Zinger of her constitutional rights (Count III); (4) the City of Lynn breached a duty it owed to Zinger which proximately caused her death (Count IV); (5) Dr. Yakov Barden was negligent in failing to follow appropriate procedures in Zinger's involuntary commitment (Count V); (6) Tri-City Mental Health Hospital was negligent in failing to follow the appropriate procedures in Zinger's involuntary commitment (Count VI); (7) defendants David Rando, Edward Marticio and Life-Line Ambulance Services, Inc. were negligent in failing to provide adequate care to Zinger (Count VII); (8) defendants Donnelly, Twyman and Alphen assaulted and battered Zinger causing her death (Count VIII); (9) defendants Rando and Marticio assaulted and battered Zinger causing her death (Count IX); and (10) defendant Jackson breached a duty he owed Zinger by failing to intervene on behalf of Zinger when the Lynn Police Officers deprived the Zinger of her civil rights (Count X).

In a letter to the Court dated June 14, 1993, counsel for defendant Tri-City informed the Court that the claims against Tri-City and Dr. Barden had been settled. At a settlement conference held on January 3, 1995, plaintiff's counsel informed the Court that they had reached a settlement with defendant Jackson. After this Court made its preliminary ruling on the instant motions for summary judgment — that the City of Lynn's policy violated the Fourth Amendment — plaintiff's counsel informed the Court that they had reached a settlement agreement with the individual police officers named in the complaint.

3. On May 4, 1994, the City of Lynn filed a motion for summary judgment. On June 15, 1994 defendants Rando and Marticio filed motions for summary judgment. The Court heard oral argument on the summary judgment

(Cont'd)

*Appendix B*

For the-reasons described below, the defendants' motion for summary judgment is hereby **DENIED** and the plaintiff's cross motion for summary judgment against the City of Lynn is hereby **GRANTED**.

## II. SUMMARY OF THE FACTS

Rose Zinger was a 64 year old woman living on 11 Nichols Avenue in Lynn, Massachusetts. Zinger spoke and understood limited English; she suffered from high blood pressure and was extremely overweight. In addition to her physical maladies, Zinger suffered from psychological problems, which according to the Complaint, were the product of, among other things, her experiences during World War II.[4]

On September 6, 1989, Dr. Yakov Barden of the Tri-City Mental Health and Retardation Center, signed an application for Zinger's involuntary commitment pursuant to M.G.L. ch. 123 § 12(a). The next day, Captain Joseph Csuka of the Lynn Police Department instructed Sergeant Richard Donnelly, and Officers Gary Twyman and William Alphen (all of the Lynn Police Department) to serve the civil commitment order. Csuka, although in possession of the order since the morning of September 7th, informed Sergeant Donnelly that the

---

(Cont'd)
motions on September 16, 1994. The City of Lynn filed a second motion for summary judgment on December 6, 1994 addressing the constitutionality of its policy of allowing forcible entries to serve civil commitment papers. Finally, on December 14, 1994, the plaintiff filed a joint memorandum in opposition to the City of Lynn's second motion for summary judgment and a cross motion for partial summary judgment on the same issue.

4. According to the Complaint, Zinger was a survivor of the Holocaust who lost many friends and family "at the hands of Nazis."

commitment would be carried out at 1:00 p.m. According to the affidavit of Sergeant Donnelly, Captain Csuka advised him that Zinger would not cooperate with them and they would have to force their way into her house.

In addition to the involuntary commitment, proceedings had been brought against Zinger resulting in an eviction order. Indeed, the police officers concede that the civil commitment was delayed until 1:00 p.m. in order to accommodate defendant Kenneth Jackson (a State Constable) who would secure the premises following the eviction and commitment.

At the scene, Constable Jackson informed the officers that based on his prior attempts to serve eviction notices, he believed Zinger would not answer the door. He instructed them to go to the rear door for the easiest point of entry into the home. The officers knocked on the door and rang the doorbell. Zinger did not answer. After approximately one minute, Donnelly ordered Alphen to kick down the door. Once through the door all three officers and Constable Jackson proceeded up the stairs to a second door which was also locked. Officer Alphen knocked on this door and said "Hello, Police." When no one answered the knocking, Donnelly ordered Alphen to kick this door down. After kicking through one panel, Zinger came to the door and opened it slightly. Donnelly showed Zinger the commitment order and told her that she needed to see a doctor. Zinger, who spoke and understood little English, yelled "why, why, no doctors" and started to close the door. Donnelly forced his foot between the door preventing it from closing all the way.

At this point, the officers claim that Zinger reached for a small knife on the kitchen table. Upon seeing the knife Officer

Alphen pushed Zinger through the door and to the floor.[5] Zinger lay face down on the ground, confused and screaming.

With Zinger forced into a prone position, all three officers handcuffed the 64 year old woman who struggled and screamed. During the process, Zinger was so distraught she urinated on herself and one of the officers.

Shortly after arriving at the scene, the officers called defendant Life-Line Ambulance to transport Zinger to the mental health facility. While waiting for the ambulance, the officers claim that they made repeated attempts to calm Zinger down. When defendants Marticio and Rando (the Life-Line emergency medical technicians) arrived, they informed the officers that due to Zinger's obesity and disposition, they could not carry her down the stairs in a chair or stretcher. Upon hearing this, the officers forced Ms. Zinger down the stairs on her buttocks one step at a time.

After bringing her to the bottom of the stairs, the officers placed her face down on a stretcher, where she was strapped in, still handcuffed behind her back. Shortly thereafter, one of the defendants noticed blood coming down the side of Zinger's mouth.

The officers then removed the handcuffs and Marticio examined her. Finding no pulse, Marticio and one of the officers began performing CPR. Zinger was pronounced dead at 2:00 p.m.

---

5. According to Constable Jackson's deposition, Zinger never actually reached the knife on the table, nor held the knife in her hand.

*Appendix B*

## III. THE SUMMARY JUDGMENT STANDARD

Summary judgment should be granted where all of the relevant pleadings, viewed in the light most favorable to the non moving party, present no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Alan Corp. v. International Surplus Lines Insurance Co.*, 22 F.3d 339, 342 (1st Cir. 1994); *Aponte-Santiago v. Lopez Rivera*, 957 F.2d 40, 41 (1st Cir. 1992); *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

## IV. THE CITY OF LYNN

### A. Liability under 42 U.S.C. § 1983

42 U.S.C. § 1983 provides a private cause of action for individuals who are subject to a deprivation of their constitutional rights by persons acting under color of state law. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978) the Court determined that municipalities and other local government units were to be included among those "persons" to whom § 1983 applies so long as certain preconditions were met. As Justice Brennan stated:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted *solely* by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent

> official policy, inflicts the injury that the government as an entity is responsible under § 1983.

*Monell*, 436 U.S. at 694 (emphasis added).

To establish liability against a municipality under § 1983 after *Monell*, a plaintiff must prove that: (1) the municipality maintained a policy or custom; and (2) the same custom or policy was the cause of and the moving force behind the deprivation of the plaintiff's constitutional rights. *Bordanaro v. Mcleod*, 871 F.2d 1151, 1156 (1st Cir. 1989) (citations omitted); *Oklahoma City v. Tuttle*, 471 U.S. 808, 819 (1984).

The plaintiff contends that the City of Lynn's policy of making warrantless entries into private residences to serve civil commitment process constituted a deprivation of Rose Zinger's right to be free from unreasonable searches and seizures. It was that policy, plaintiff contends, that led to Ms. Zinger's injury and ultimately her death.

**B. The Policy of Serving Involuntary Commitment Orders**

To support its claim that a municipal policy existed, the plaintiff points to the deposition of John W. Suslak, the City of Lynn's Rule 30(b)(6) witness who was designated the most "knowledgeable regarding the rules, regulations, and policies of the Lynn Police Department regarding the serving of involuntary commitment papers." Plaintiff's Memorandum in Opposition to the City of Lynn's Motion for Summary Judgment at p. 10. At his deposition, Suslak stated:

*Appendix B*

> I think that the officers at the scene would be obligated to take all reasonable efforts to make a peaceable entry if, in fact, under the circumstances, they were confronting, that would be safer to do. And then if they were, in fact, were advised that someone inside the apartment where we had a pink paper,[6] escalate the degree of force to effect necessary to make an entry to effect the pink paper.

*Id* at p. 9. In other words, the City of Lynn's policy was to try to effect a peaceful execution of a civil commitment order in the first instance. But, should there be resistance, the police were authorized to "escalate the degree of force" necessary to effect the hospitalization. There was no requirement that a neutral magistrate intercede, or that a warrant be sought prior to the seizure of a human being or to the entry of a home. The officer on the line, armed only with a ten day commitment authorization, could decide when and whether to break down the door to someone's home[7] and seize them.

It is uncontested that the officers at 11 Nichols Avenue, acting pursuant to an official municipal policy, broke into Rose Zinger's apartment, and that this municipal policy could be found to have triggered the set of circumstances leading to her injury and death. The only question for summary judgment is whether the City's policy violated the Fourth Amendment.

---

6. "Pink paper" is the colloquial name for a § 12 commitment order.

7. Indeed the policy apparently allowed the officers to break into a third party home if the subject of the commitment order was present.

*Appendix B*

**C. Warrantlese Searches of a Dwelling are Presumptively Unreasonable.**

The Fourth Amendment is unequivocal:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment's goal is the protection of personal privacy, and the fundamental dignity of citizens. The method of choice for protecting that goal is the warrant mechanism which requires a neutral magistrate to evaluate the facts and determine whether and when government officials may search.

The specter of police officials breaking down the door of a private home has been, from the drafting of the Fourth Amendment to the present, a singularly frightening one. Traditionally, a citizen's home has been singled out for special protection. *United States v. United States District Court*, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."); *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("at the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home.")

Of equal, if not greater, significance is the seizure of the human being herself, the deprivation of her liberty. *Henry v.*

*United States*, 361 U.S. 98, 100 (1959) ("For it is the command of the Fourth Amendment that no warrants for *either* searches or arrests shall issue except 'upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' ") (emphasis added.)

So important is the protection of personal privacy and the fundamental dignity of individuals against the unwarranted intrusion of governmental officials that the Supreme Court has held that all warrantless searches and seizures are presumptively unreasonable. *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Camara v. Municipal Court of the City & County of San Francisco*, 387 U.S. 523, 528 (1967); *Payton v. New York*, 445 U.S. 573, 586 (1980).

The exceptions to the warrant requirement are limited in number and strictly construed. *Katz v. United States*, 389 U.S. 347 (1967). Those situations include: fear of imminent destruction of evidence; the "hot" pursuit of a fleeing suspect; immediate threats to the public safety; and fires or other emergencies. *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984). These "exigencies" suspend the Fourth Amendment's requirements only because pre-search compliance would be impossible if not dangerous to the surrounding community. *United States v. Irizarry*, 673 F.2d 554, 557 (1st Cir. 1982) (" 'Exigent circumstances' have traditionally been found in those crisis situations when there is compelling need for official action and no time to secure a warrant.") (*citing Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (warrantless entry into a burning building to put out a blaze). *See also Chimel v. California*, 395 U.S. 752, *reh'g. denied*, 396 U.S. 809 (1969) (search "incident to arrest"); *Warden v. Hayden*, 387 U.S. 294 (1967) (warrantless

entry in "hot" pursuit of an armed robber); *Ker v. California*, 374 U.S. 23, 40-43 (1963) (warrantless entry to prevent destruction of evidence where such destruction is reasonably thought imminent); *United States v. Zurosky*, 614 F.2d 779 (1st Cir. 1979) (warrantless entry into warehouse at 4:25 a.m. when activity inside reasonably suggests that a breaking and entering is taking place); *United States v. Edwards*, 602 F.2d 458, 468 (1st Cir. 1979) (warrantless entry to prevent destruction of heroin reasonably thought imminent); *United States v. Miller*, 589 F.2d 1117, 1126 (1st Cir. 1978), *cert. denied*, 440 U.S. 958, (1979) (warrantless entry and reentry of a boat where drowning suspected and tidal flow created need for swift action).

To be sure, in certain non-criminal, regulatory or administrative situations, the Court has held that the Fourth Amendment did not apply at all, or that the high level of protection offered by a warrant was unnecessary so long as the search was otherwise "reasonable." For the most part, these involve instances where the Court has characterized the intrusion as far less invasive than traditional searches and seizures.[8] In *Wyman v. James*, 400 U.S. 309, 326 (1971), for example, the Supreme Court upheld a New York statute which made receipt of welfare benefits contingent upon the

---

8. For example, *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (finding warrantless search of a parolee's home by probation officials reasonable); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (allowing warrantless, work-related searches of employee's desks and offices without probable cause); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (school officials may conduct warrantless searches of some student property without probable cause); *New York v. Burger*, 482 U.S. 691 (1987) (permitting warrantless search of automobile junkyards as business "closely regulated" by the state); *United States v. Cardona*, 903 F.2d 60, 69 (1st Cir. 1990) (finding warrantless arrest of parole violator in his home valid as a "special needs" exception to the warrant requirement).

beneficiary's assent to a home visit by a state social worker. In upholding the statute, the *Wyman* Court stated that "the home visitation as structured by the New York statutes is a reasonable administrative tool; that it serves a valid and proper administrative purpose for the dispensation of the AFDC program; that it is not an unwarranted invasion of personal privacy; and that it violates no right guaranteed by the Fourth Amendment." *Wyman*, 400 U.S. at 326. The Court rested its decision on a determination that the purpose of the home visit requirement was "both rehabilitative and investigative," and thus, not the functional equivalent of a search in the traditional criminal law context. *Wyman*, 400 U.S. at 317.

Although warrantless social worker "visitations" may be minimally invasive and fail to trigger the warrant protections of the Fourth Amendment, the warrantless entry into a private dwelling for the sole purpose of seizing and forcibly hospitalizing the resident is surely another matter.[9]

---

9. In *Soldal v. Cook County, Illinois*, __ U.S. __, 113 S.Ct. 538 (1992) for instance, the Court determined that police officers that conspire with private individuals to execute an illegal self help eviction are liable for violations of the Fourth Amendment. The seizure and removal of the plaintiff's home fit within the Amendment's protections no matter how the action was labelled. The Court noted:

> In our view, the reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question of whether the [Fourth] Amendment applies. What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house

(Cont'd)

When liberty is involved, as well as the privacy of one's home, the highest protection of the Fourth Amendment, namely the warrant mechanism is required. When referring to the warrantless entry of a home to execute an arrest warrant, the Court in *Payton v. New York*, 445 U.S. 573, 588 (1980), cited to the following language, with approval:

> To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.

*citing United States v. Reed*, 572 F. 2d 412, 423 (1978), *cert. denied sub. nom. Goldsmith v. United States*, 439 U.S. 913.

**D. The Requirements of the Fourth Amendment Apply to Entries Under M.G.L. ch. 123 § 12**

The function of M.G.L. ch. 123 § 12 is to provide the

---

(Cont'd)

> was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all. As we have observed on more than one occasion, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

*Soldal*, 113 S.Ct. at 548 (quoting *Camara*, 387 U.S. at 530).

*Appendix B*

Commonwealth with the ability to place an individual in the custody of a hospital facility in order to prevent serious harm as a result of the individual's mental illness. It provides a method for exercising control over the individual, to deprive him or her of liberty and necessarily, privacy, even if only on a temporary basis. While the label may be beneficent — for the patient's own good or the good of the society — the fact remains that it is a seizure of the person, effected in this case by a forcible entry into a citizen's home.

The City of Lynn argues that an application for an order of involuntary commitment — completed by a *physician* — by statute obviates the need for a warrant. While the statute provides for a warrant proceeding, Lynn claims that it only applies when an individual *other* than a physician or a police officer seeks a ten-day commitment. M.G.L. ch. 123 § 12(a) permits a licensed physician or psychologist to "restrain or authorize the restraint of [a] person and apply for hospitalization of such person for a ten day period" based on a finding of "a likelihood of serious harm by reason of mental illness," apparently on that physician's own authority. In fact, the statute does not require the doctor to personally examine the patient, but may make the diagnosis based upon "facts or circumstances" represented to him. Section 12(e) permits "any person" to apply for a ten-day commitment but specifies that the application must be made to "a district court justice." The District Court must hold a hearing and, if it determines that the evidence is sufficient, it "may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper."

It might be suggested that this is a valid procedure because civil commitment processes are medical, or therapeutic, and as a result, less invasive than a traditional criminal search (as in

*Wyman v. James, supra*). Indeed, one might argue that the fact that a physician is apparently in charge, and that this is "only" a ten-day institutionalization subject to a court review makes it a "reasonable" civil entry, without requiring the formal protection of a warrant. *See* e.g. Note, *Rehabilitation, Investigation, and the Welfare Home Visit*, 79 Yale L.J. 746 (March 1971).

I disagree. Although a certified physician or psychologist might be uniquely qualified to evaluate the emotional condition of a patient, he or she is not qualified to determine whether probable cause exists to support an unconsented entry of an individual's home or seizure of an individual. The Constitution specifically imparts that responsibility to the judiciary. *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984) (per curiam) (*quoting Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted)); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *see also United States v. Place*, 462 U.S. 696, 701 (1983).

Moreover, the agents of the doctors in this case are police officers with guns and batons, not hospital orderlies and nurses. There is no therapeutic relationship which a warrant mechanism might disrupt. That disruption has already occurred once the police — unaccompanied by physicians or health personnel — seek a forcible entry and seizure. In fact, the parties constantly referred to the service of the commitment order as a "police matter." In any case, to the person whose home is broken into, to the neighbors who watch her dragged from her home screaming and struggling, the words "medical" or "therapeutic" would seem to be a misnomer.[10]

---

10. In fact, substantial privacy issues would arise if a civil commitment order were served when the subject was at the home of another, who does not consent to entry. *See Steagald v. United States*, 451 U.S. 204 (1981) (requiring a search warrant for a third person's home to effect an arrest of a suspect located therein).

In effect, Lynn suggests that a physician's blessing somehow strips a putative mental patient of the safeguards of the Fourth Amendment, a result that would be untenable. As the experience of the former Soviet Union suggests, coerced hospitalization, ostensibly because of mental illness, is uniquely susceptible to abuse. Indeed, Massachusetts was one of the innovators in identifying the risks to individual liberty and dignity in the civil commitment process. The legislature achieved this by hedging the statute with strict safeguards — that the order of commitment be temporary unless certain standards are met, that the order be subject to periodic judicial review — and that a warrant be required under certain circumstances. I believe that this case is one of them.[11]

**E. There Were no Exigent Circumstances Justifying Dispensing with the Warrant Requirement**

There were no exigent circumstances in this case, justifying the suspension of the warrant requirement. The test for determining the presence of exigent circumstances which would suspend the warrant requirement "is whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." *United States v. Adams*, 621 F.2d 41, 44 (1st Cir. 1980). The burden of proving the necessity for a warrantless search is on the Government, and that burden is a substantial one. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1983).

The determination of exigent circumstances rests on "the

---

11. The statute does not mandate a different interpretation. Indeed, a saving constitutional interpretation is entirely consistent with the statutory framework. A warrant would be required whenever it is clear that the "pink paper" will not be voluntarily complied with, that police officers will be involved, and force is threatened.

gravity of the underlying offense; whether delay poses a threat to police or the public safety; whether there is a great likelihood that evidence will be destroyed if there is delay until a warrant can be obtained." *United States v. Curzi*, 867 F.2d 36, 41-42 (1st Cir. 1989) (*quoting United States v. Veillette*, 778 F.2d 899, 902 (1st Cir. 1985)). *See also United States v. Wilson*, 36 F.3d 205, 209-210 (1st Cir. 1994) (finding exigent circumstances to enter an apartment in housing development and seize contraband).

The only exigent circumstances that the City points to are those underlying the civil commitment order itself: (1) that the statute requires that an order may only be issued "so as to avoid the likelihood of serious harm by reason of mental illness"; and (2) that Dr. Barden's application specifically notes that Ms. Zinger is dangerous to others.

According to the depositions submitted, the application for an involuntary order of commitment for Ms. Zinger was completed by Dr. Barden on September 6, 1989. Constable Jackson arranged for the application to be taken from Dr. Barden's office to the Lynn Police station on the next day. Jackson discussed the situation with Captain Csuka, informing the officer that he would be conducting the eviction proceeding at 1:00 p.m. Csuka agreed to that hour and informed Jackson that he would have Lynn Police Officers meet Jackson at 11 Nichols Avenue to serve the commitment order. At 10:30 a.m., Csuka, true to his word, ordered Sergeant Donnelly to meet Jackson at the premises at 1:00 p.m. to serve the order. Csuka further informed Donnelly that the officers serving the order might have to force their way into Zinger's home.

The presence of Dr. Barden's application for the order of involuntary commitment did not amount to exigent

circumstances justifying the forced warrantless entry into Zinger's home. To the contrary, the Lynn Police acted with *leisure* in arranging a convenient time to effectuate the service of the involuntary commitment order. The determinative issue was convenience, dovetailing the service of the commitment order with the service of the eviction papers. As Justice Jackson stated in *McDonald v. United States*:

> When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.

335 U.S. 451, 459-460 (1948). No such consequences were present here.

Based upon Constable Jackson's prior attempts to serve the eviction process the officers had no indication that waiting a few hours would present an immediate threat to either Ms. Zinger or the community. Moreover, since the officers already had information that Ms. Zinger would not let them into her home, they could have presented that information and the involuntary commitment order to a magistrate *prior* to their attempt to serve the order at 1:00 p.m. Instead, the officers (following City policy) chose to break into Zinger's home to serve the civil commitment order. Therefore, no emergency situation existed which would justify the officers' entry into Zinger's home without a warrant. *See, Suss v. A.S.P.C.A.*, 823 F.Supp. 181, 187-188 (S.D.NY 1993) (finding no exigent circumstances to justify ASPCA breaking into a business to rescue a cat trapped in adjoining alley). Accordingly, the plaintiff's cross motion for summary judgment against the City of Lynn is **GRANTED**.

*Appendix B*

## V. DEFENDANTS MARTICIO AND RANDO

Defendants Marticio and Rando argue that M.G.L. ch. 111C § 14 grants emergency medical technicians immunity from liability and therefore they are entitled to judgment as a matter of law. M.G.L. ch. 111C § 14 states in relevant part:

> No emergency medical technician certified under the provisions of this Chapter[12] and no police officer or fire fighter, who in the performance of his duties and in ***good faith*** renders emergency first aid or transportation to an injured person or to a person incapacitated by illness shall be personally in any way liable as a result of rendering such aid or as a result of transporting such person to a hospital or other safe place.

(emphasis added). The issue here is whether Rando and Marticio acted in good faith when they "treated" Zinger.

The defendants are entitled to a presumption in favor of good faith. *Spiegal v. Beacon Participations, Inc.*, 297 Mass. 398, 416-417 (1937); *Ramos v. Board of Selectmen of Nantucket*, 16 Mass.App.Ct. 308, 314 (1983). In *Ramos*, the court described bad faith as:

> [A] general and somewhat indefinite term. It has no constricted meaning. It cannot be defined with exactness. It is not simply bad judgment. It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty

---

12. Both Rando and Marticio were certified emergency medical technicians at the time of the incident.

> through some motive of interest or ill will. It partakes of the nature of fraud.

*Ramos*, 16 Mass. App.Ct. at 314.

Here, the plaintiff offered testimony that Ms. Zinger was left unattended, lying face down on a stretcher handcuffed behind her back, that the EMTs never interceded concerning the way in which she was being restrained by the police and never monitored her medical condition. Under these circumstances, the plaintiff satisfied its burden and overcame the presumption of good faith sufficient to create a material issue of fact as to whether defendants Rando and Marticio acted in good faith and are therefore entitled to the protection of M.G.L. ch. 111C § 14.[13] Accordingly, defendants Rando and Marticio's motion for summary judgment is hereby **DENIED**.

## VI. CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is hereby **DENIED** and the plaintiff's cross motion for summary judgment against the City of Lynn is hereby **GRANTED**.

**SO ORDERED.**

**Dated: February 2, 1995** s/ Nancy Gertner
NANCY GERTNER, U.S.D.J.

---

13. In other jurisdictions which have a "good samaritan" statute similar to M.G.L. ch. 111C § 14, the issue of whether the EMTs acted in good faith was a matter of fact reserved for the jury. *Wright v. City of Los Angeles*, 219 Cal.App.3d 318, 346-347 (2d. Dist., 1990) (affirming jury's award of damages against paramedics for gross negligence).

## APPENDIX C — RELEVANT CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

### CONSTITUTION OF THE UNITED STATES OF AMERICA-1787

### ARTICLE [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### 42 U.S.C. § 1983

**§ 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Appendix C*

## MASS. GEN. L. CH. 123

**123:1. Definitions.**

Section 1. The following words as used in this section and sections two to thirty-seven, inclusive, shall, unless the context otherwise requires, have the following meanings:

"Commissioner", the commissioner of mental health.

"Department", the department of mental health.

"Dependent funds", those funds which a resident is unable to manage or spend himself as determined by the periodic review.

"District court", the district court within the jurisdiction of which a facility is located.

"Facility", a public or private facility for the care and treatment of mentally ill persons, except for the Bridgewater State Hospital.

"Fiduciary", any guardian, conservator, trustee, representative payee as appointed by a federal agency, or other person who receives or maintains funds on behalf of another.

"Funds", all cash, checks, negotiable instruments or other income or liquid personal property, and governmental and private pensions and payments, including payments pursuant to a Social Security Administration program.

"Independent funds", those funds which a resident is able to manage or spend himself as determined by the periodic review.

*Appendix C*

"Likelihood of serious harm", (1) a substantial risk of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community.

"Qualified physician", a physician who is licensed pursuant to section two of chapter one hundred and twelve who is designated by and who meets qualifications required by the regulations of the department; provided that different qualifications may be established for different purposes of this chapter. A qualified physician need not be an employee of the department or of any facility of the department.

"Qualified psychologist", a psychologist who is licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive, of chapter one hundred and twelve who is designated by and who meets qualifications required by the regulations of the department, provided that different qualifications may be established for different purposes of this chapter. A qualified psychologist need not be an employee of the department or of any facility of the department.

"Restraint", bodily physical force, mechanical devices, chemicals, confinement in a place of seclusion other than the placement of an inpatient or resident in his room for the night, or

any other means which unreasonably limit freedom of movement.

"Superintendent", the superintendent or other head of a public or private facility.

**123.12. Emergency restraint of dangerous persons; application for hospitalization examination.**

Section 12. (a) Any physician who is licensed pursuant to section two of chapter one hundred and twelve or a qualified psychologist licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive of said chapter one hundred and twelve, who after examining a person has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a ten day period at a public facility or at a private facility authorized for such purposes by the department. If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician or qualified psychologist on the basis of the facts and circumstances may determine that hospitalization is necessary and may apply therefore. In an emergency situation, if a physician or qualified psychologist is not available, a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a ten day period at a public facility or a private facility authorized for such purpose by the department. An application for hospitalization shall state the reasons for the restraint of such person and any other relevant information

which may assist the admitting physician or physicians. Whenever practicable, prior to transporting such person, the applicant shall telephone or otherwise communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person and also to give notice of any restraint to be used and to determine whether such restraint is necessary.

(b) Only if the application for hospitalization under the provisions of this section is made by a physician specifically designated to have the authority to admit to a facility in accordance with the regulations of the department, shall such person be admitted to the facility immediately after his reception. If the application is made by someone other than a designated physician, such person shall be given a psychiatric examination by a designated physician immediately after his reception at such facility. If the physician determines that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness he may admit such person to the facility for care and treatment.

(c) No person shall be admitted to facility under the provision of this section unless he, or his parent or legal guardian in his behalf, is given an opportunity to apply for voluntary admission under the provisions of paragraph (a) of section ten and unless he, or such parent or legal guardian has been informed (1) that he has a right to such voluntary admission, and (2) that the period of hospitalization under the provisions of this section cannot exceed ten days. At any time during such period of hospitalization, the superintendent may discharge such person if he determines that such person is not in need of care and treatment.

(d) A person shall be discharged at the end of the ten-day period unless the superintendent applies for a commitment under the provisions of sections seven and eight of this chapter or the person remains on a voluntary status.

(e) Any person may make application to a district court justice for a ten day commitment to a facility of a mentally ill person whom the failure to confine would cause a likelihood of serious harm. After hearing such evidence as he may consider sufficient, a district court justice may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgement the condition or conduct of such person makes such action necessary or proper. Following apprehension, the court shall have the person examined by a physician designated to have the authority to admit to a facility or examined by a qualified psychologist in accordance with the regulations of the department. If said physician or qualified psychologist reports that the failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness, the court may order the person committed to a facility for a period not to exceed ten days, but the superintendent may discharge him at any time within the ten day period.

## APPENDIX D — APPLICATION FOR TEMPORARY HOSPITALIZATION

Department of Mental Health
Provisional Form 5A, July 1, 1971

Effective November 1, 1971

COMMONWEALTH OF MASSACHUSETTS

APPLICATION FOR TEMPORARY HOSPITALIZATION
(Ref. Section 12, Chapter 123, General Laws)

To the Superintendent of the *Tri-City Mental Health* Hospital.

I hereby apply for care in the above hospital for a period not exceeding ten days of *Ruhlya* [sic] *Zinger* who, in my opinion requires hospitalization so as to avoid the likelihood of serious harm* by reason of mental illness, *..... I have/***have not** personally examined said person. Evidence supporting my opinion includes:

*[Patient] has a [history] of mental illness and she was hospitalized at Danvers [State] Hospital couple of years ago. [Patient] is very angry and hostile; she is very impulsive and explosive. She made threats to harm her ex-husband. [Patient] is dangerous to others.*

The following additional information is submitted:

1. Personal data regarding patient

   a. Sex *female*

   b. Address (street, town, state) *11 Nichols Ave. Lynn, MA*

*Appendix D*

c. Birthdate (month, day, year)

d. Birthplace *Lynn* [sic]

e. Occupation *Retired*

f. Soc. Sec. No. *Unknown*

g. Marital state (underline): Never married, married, remarried, separated, ***divorced***, widowed.

h. Place and time of most recent psychiatric or retardation care (if none, so state): *None*

i. Prior care at this hospital (underline): yes. ***no***.

j. Name, address, and telephone number of husband, wife, nearest relative, or friend:

2. Other relevant data which may assist the admitting physician, including medical, medication administered and reasons for restraint:

*May restrain PRN*

Signed s/ Yakov Barden Applicant

Print or type name of applicant:

s/ Yakov Barden,

Address: *Tri-City Crisis*
*Lynn*

*Appendix D*

Capacity of Applicant (underline):

***Licensed Physician***, Police Officer,
***Qualified Physician***.

Date *9/06/89* 19__

---

* The Definition of "likehood of serious harm" which in association with mental illness justifies involuntary retention in a mental health or retardation facility is as follows (G.L. 123 Sect. 1):

> (1) "Substantial risk of physical harm to the person himself as manifested by evidence of threats of, or attempts at, suicide or serious bodily harm;
>
> (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or
>
> (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgement is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community."

## APPENDIX E — STATE CIVIL COMMITMENT STATUTES AUTHORIZING SEIZURE PURSUANT TO CERTIFICATION BY MENTAL HEALTH PROFESSIONALS

ALASKA STAT. § 47.30.705 (1995);

ARIZ. REV. STAT. ANN. § 36-524 (1993);

CAL. WELFARE AND INSTITUTIONS CODE § 5150 (West 1984);

COLO. REV. STAT. ANN. § 27-10-105 (West 1990);

CONN. GEN. STAT. ANN. § 17a-502 (West 1992);

FLA. STAT. ANN. § 394.463 (West 1993);

GA. CODE ANN. § 37-3-41 (1995);

ILL. ANN. STAT. ch. 405, paras. 5/3-601, 5/3-602, 5/3-605 (Smith-Hurd 1993);

LA. REV. STAT. ANN. § 28:53 (West 1989);

MD. CODE ANN., HEALTH-GENERAL § 10-622 (1994);

MICH. COMP. LAWS ANN. §§ 330.1423, .1425, .1427 (West 1992);

NEB. REV. STAT. §§ 83-1024, 1026, 1028 (1995);

NEV. REV. STAT. §§ 433A.150, .160 (1991);

N.M. STAT. ANN. § 43-1-10 (Michie 1993);

*Appendix E*

N.Y. MENTAL HYGIENE LAW § 9.27 (McKinney 1996);

N.D. CENT. CODE § 25-03.1-25 (1995);

OR. REV. STAT. ANN. § 426.233 (1993);

PA. STAT. ANN. tit. 50, § 7302 (Cum. Supp. 1995);

R.I. GEN. LAWS § 40.1-5-7 (1990);

S.C. CODE ANN. § 44-17-410 (Law Co-op. 1985 & Supp. 1995); S.D. CODIFIED LAWS ANN. § 27A-10-1, 10-2 (1992);

UTAH CODE ANN. § 62A-12-232 (1993);

VT. STAT. ANN. tit. 18, § 7504 (1987);

WASH. REV. CODE ANN. § 71.05.160 (West 1992);

W. VA. CODE § 27-5-2 (1992).